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No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

STURM, RUGER & COMPANY, INC.,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR A WRIT OF CERTIORARI

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151 pp

QUESTIONS PRESENTED

1. Is an administrative subpoena issued in conjunction with and in furtherance of an unlawful inspection program enforceable? Specifically, is an administrative subpoena issued by a local area director of the Occupational Safety and Health Administration ("OSHA") to further an inspection program targeting select New Hampshire employers suspected of exposing their employees to unspecified ergonomic hazards enforceable if the targeted program is a substantive rule established in circumvention of the rulemaking requirements mandated by Congress under the Occupational Safety and Health Act ("OSH Act"), 29 U.S.C. § 651 *et seq.* and the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*?

2. Does the "general duty clause," 29 U.S.C. § 654(a)(1), which imposes on employers a duty to provide "employment and a place of employment which are free from recognized hazards," permit OSHA to circumvent the rulemaking procedures established by Congress?

3. Does a court, in an action brought by an administrative agency to enforce its subpoena, have inherent authority to vacate a penalty imposed by that same administrative agency upon the party who has invoked its Constitutional right to compulsory process?

LIST OF PARTIES

The names of all parties to the proceedings in the court whose judgment is sought to be reviewed appear in the caption of the case. Petitioner Sturm, Ruger & Company has no non-wholly owned subsidiaries.

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Sturm, Ruger & Company, Inc. ("Sturm, Ruger"), by its undersigned counsel, respectfully petitions for a writ of certiorari to review the judgment of the court of appeals in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a)[1] is reported at 84 F.3d 1. The opinion of the district court (App. 15a) is reported at 903 F. Supp. 239. The opinion of the magistrate judge (App. 40a) is not reported.

STATEMENT OF JURISDICTION

The judgment of the court of appeals was entered on May 14, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

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1. References to the Appendix to this petition shall be designated herein as "(App. __)." References to the joint appendix in the court of appeals shall be designated herein as "(Cir. App. __)."

The Fifth Amendment to the United States Constitution provides, *in pari materia*, that:

> No person shall . . . be deprived of life, liberty, or property, without due process of law.

Sections 551, 553 an 555 of the Administrative Procedures Act, 5 U.S.C. § 551 *et seq.*, are reproduced at App. 72a; Sections 654(a)(1) and (a)(2), 655(a)-(c), 657(a)-(c), (f), and (g) of the Occupational Safety and Health Act, 29 U.S.C. § 651 *et seq.*, are reproduced at App. 62a; 29 Code of Federal Regulations (C.F.R.) §§ 1903.4 and 1904.7 are reproduced at App. 57a; 57 Federal Register (F.R.) 34192 to 34199 are reproduced at App. 79a; Public Laws (P.L.) 104-19 § 602 and 104-99 § 101(c) are reproduced at App. 60a.

STATEMENT OF THE CASE

A. Summary

Sturm, Ruger is a manufacturer of firearms and castings with facilities in Newport and Londonderry, New Hampshire. In 1993, Sturm, Ruger employed 1175 employees in its New Hampshire facilities, 80% in manufacturing positions, which made Sturm, Ruger the eleventh largest employer and eighth largest manufacturer in that state.

The Occupational Safety and Health Administration ("OSHA") is that part of the United States Department of Labor ("USDOL") responsible for enforcement of the OSH Act, 29 U.S.C. § 651 *et seq.* For purposes of administration and enforcement, the United States is divided into ten (10) regions, with each region having a Regional Administrator. Each state or part thereof which is subject to direct federal oversight under the OSH Act is administered by an OSHA area director.

On or about June, 1991, OSHA placed ergonomic rulemaking on its regulatory agenda, and on August 3, 1992, announced its intention to begin ergonomic rulemaking by requesting interested persons to answer questions published in the Federal Register. (App. 79a). Apparently dissatisfied with the national rulemaking process, the New Hampshire OSHA Area Director, on December 31, 1992, obtained a computer printout from the New Hampshire Bureau of Workers' Compensation detailing claims of first reports of injury/illness for all New Hampshire employers, and without notice or comment, and using his own definitions and methodology, began targeting New Hampshire employers for ergonomic enforcement inspections because, in his opinion, they employed individuals suffering from repetitive motion disorders.

On August 17, 1993, while national ergonomic rulemaking was progressing, an OSHA compliance officer arrived at the Sturm, Ruger facility and, among other things, presented Sturm, Ruger with a letter describing the New Hampshire Ergonomic Local Emphasis Program ("LEP"). (App. 104a). On November 12, 1993, OSHA presented Sturm, Ruger officials with a detailed questionnaire and document demand, which Sturm, Ruger forwarded to its attorney. (App. 109a). After refusing to comply with repeated requests for this information, on January 12, 1994, Sturm, Ruger was served with an OSHA administrative subpoena seeking a broad range of information related to ergonomics. (App. 107a). Sturm, Ruger promptly questioned the validity of the subpoena, claiming it was in furtherance of an invalid and improper targeted inspection and enforcement action. On May 5, the United States filed a petition in the United States District Court for the District of New Hampshire seeking enforcement of its subpoena. During the pendency of this action in the district court, OSHA served Sturm, Ruger with a willful citation and $9,000 fine for refusing to produce certain subpoenaed documents. (App. 99a).

B. Background: OSHA's Inability to Promulgate an Ergonomic Standard

1. Ergonomics

Neither the OSH Act nor OSHA standards expressly address ergonomics, alleged ergonomic disorders or ergonomic hazards. Due to the controversial nature of the subject matter, OSHA has been unable to promulgate an ergonomic standard under § 654(a)(2) and § 655(a)-(b). OSHA broadly defines "ergonomics" as: "the study of the design of requirements of work in relation to the physical and psychological capabilities and limitations of people; that is, ergonomics seeks to fit the job to the person rather than the person to the job. The aim of the discipline is to prevent the development of occupational disorders and to reduce the potential for fatigue, error or unsafe acts through evaluation and design of facilities, environments, jobs, tasks, tools, equipment, processes and training methods to match the capabilities of specific workers." (App. 88a).

The controversial nature of this pseudoscience is underscored by the fact even proponents of establishing an OSHA ergonomic standard have conceded that reduction or elimination of work related risk factors (such as repetitiveness, forcefulness, awkward position, vibration) may not necessarily result in either the elimination or reduction of ergonomic "injuries or illnesses" from the workplace.[2] Appropriately capturing the controversial nature of the subject of ergonomics, an editorial entitled "Ergonomic Disorders" appeared in the May

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2. Barbara A. Silverstein *et al. Hand Wrist Disorders Among Investment Cast Plant Workers*, 12 J. Hand Surgery 838 (1987); *See also*, Thomas J. Armstrong *et al. Ergonomic Considerations in Hand and Wrist Tendonitis*, 12 J. Hand Surgery 830 (1987); Victoria R. Masear *et al.*, *An Industrial Cause of Carpal Tunnel Syndrome*, 11A J. Hand Surgery 222 (1986); Nortin M. Hadler, *Cumulative Trauma Disorders: An Iatrogenic Concept*, 32 J. Occupational Medicine 38 (1990).

1995 publication of *The Journal of Hand Surgery* which "urge[d] Government to exercise restraints in [prematurely] considering regulations designed to reduce the incidence" of ergonomic disorders. (App. 91a). Within this context, OSHA continues to struggle to address workplace ergonomic issues.

2. OSHA Attempts Ergonomic Rulemaking

As stated above, in 1991, for the first time, OSHA formally placed ergonomic rulemaking on its regulatory agenda by publishing in the Federal Register an advanced notice of proposed rulemaking. (App. 79a). Simultaneously, on June 21, 1991, OSHA sent a draft copy of questions for comment related to ergonomics to over two hundred parties such as labor organizations, trade associations, occupational groups and members of the ergonomic community. On April 17, 1992, despite requests from labor organizations to issue emergency ergonomic temporary standards, OSHA determined not to do so. (App. 84a-85a).

3. Ergonomics, OSHA Act Reform and Congress

In an effort to speed ergonomic rulemaking (and to amend the OSH Act), Representative Ford (D. Michigan) filed a bill commonly known as "The OSHA Reform Act", HR 1280. (The Senate counterpart was S 575, the "Comprehensive Occupational Safety and Health Act of 1993"). Contained within that bill were specific provisions dealing with ergonomics. Upon passage, the Reform Bill would have required OSHA to, among other things, promulgate an ergonomic standard within two (2) years of enactment. This Bill was never enacted by the Congress.

C. The New Hampshire Area Director Engages in His Own Rulemaking: the NH Ergonomic Local Emphasis Program

In October, 1991 in apparent response to a 1986-1987 report published by the New Hampshire Bureau of Workers Compensation (which stated that of the 76,000 workers' compensation claims filed in New Hampshire during that period, 226 could be characterized as repetitive trauma injuries), and in total disregard of the then ongoing OSHA ergonomic rulemaking procedure, the New Hampshire OSHA Area Director David May authorized a Local Emphasis Program for the inspection of employers in New Hampshire with allegedly high incidences of multiple movement disorders. (App. 104a). In furtherance of that program, on December 31, 1992, the Area Director obtained a computer printout from the New Hampshire Bureau of Workers' Compensation detailing claims or first reports of injury/illness for all New Hampshire employers. From that data, the Area Director developed a list of employers whose employees, in his opinion, had filed workers' compensation claims based on incidences of multiple movement disorder. Based upon the New Hampshire OSHA Area Director's quantitative calculations, Sturm, Ruger was targeted for inspection.

D. The 1993 Inspection of the Sturm Ruger Facility

On August 17, 1993, OSHA Compliance Safety and Health Officer ("CSHO") Donald DeWees arrived at the Sturm, Ruger facility and presented Sturm, Ruger representatives with an employee complaint received by the OSHA New Hampshire Area Office alleging poor air quality and housekeeping practices at Sturm, Ruger. DeWees also presented Personnel Director Lynn Merrill a letter, dated August 17, 1993, from OSHA's Area Director, stating that Sturm, Ruger's facility had been scheduled for inspection in accordance with the New Hampshire Ergonomic LEP. (App. 104a). This letter, in describing the New Hampshire Ergonomic LEP, referred to "voluntary guidelines

. . . to assist employers in developing abatement programs for ergonomic hazards" and noted that the Program consisted of four elements, including "worksite analysis, hazard prevention, medical management and education."

DeWees demanded entry and requested copies of Sturm, Ruger's OSHA Form 200 (Log of Occupational Injuries and Illnesses) and Form 101 (First Reports of Injuries Forms) for the period 1988 to 1992. Sturm, Ruger granted entry to DeWees to investigate the air contaminant complaint without requiring OSHA to obtain a warrant (as had been Sturm-Ruger's long-standing practice not to require a warrant) and provided DeWees with the documentation he requested. After testing, the alleged air quality violations were found to be without merit. Certain alleged housekeeping violations were noted, citations were subsequently issued, and ultimately that matter was amicably and voluntarily resolved without the necessity of litigation.

On November 12, 1993, DeWees returned and requested that Sturm, Ruger complete an "Ergonomics Questionnaire". (App. 109a). That questionnaire began: "Collection of information for ergonomic cases involving citations." After reviewing the questionnaire, DeWees was advised that Sturm Ruger was going to consult with its counsel.

E. The Issuance of the Administrative Subpoena

DeWees reappeared at Sturm, Ruger's facility on January 10, 1994. He asked for the completed questionnaire and supporting documentation. He was advised that Sturm, Ruger did not intend to respond to this questionnaire or produce any documentation and he was informed that, until further notice, Sturm, Ruger would no longer voluntarily cooperate with the OSHA ergonomic inspection program. On January 11, 1994, DeWees served a subpoena signed by the Area Director upon

Sturm, Ruger. (App. 107a). The subpoena requested a broad list of documents directed toward ergonomics and included a questionnaire. In response, Sturm, Ruger served a Freedom of Information Act request upon the OSHA New Hampshire Area Director seeking information related to the New Hampshire Ergonomic LEP.

On January 19, 1994, Sturm, Ruger's attorney wrote the OSHA Area Director regarding Sturm, Ruger's willingness to cooperate with OSHA regarding the New Hampshire Ergonomic LEP, provided OSHA would agree that any information supplied would not be used as the basis for the imposition of civil penalties or fines. (App. 95a). Sturm, Ruger's position was consistent with a prior employee complaint inspection of Sturm, Ruger wherein OSHA stated it had no authority to issue any citations for alleged ergonomic hazards within Sturm, Ruger's facility (because there was no standard or any authority under the general duty clause), a local emphasis program then ongoing in the State of Maine (which emphasized voluntary compliance), and the OSHA voluntary special emphasis program addressing ergonomic issues in the meatpacking industry that had been initiated by the Secretary in 1990. The Area Director would not agree with this request, a position seemingly inconsistent with OSHA's letter of August 17, 1993 announcing the ostensibly voluntary nature of the LEP. The Area Director confirmed that the LEP was a targeted enforcement action and not a voluntary program.

On May 27, 1994, following failed negotiations between Sturm, Ruger's legal counsel, the OSHA Local Area Director and United States Department of Labor attorneys, OSHA, through Robert B. Reich, Secretary of Labor, applied to the United States District Court for the District of New Hampshire for an Order enforcing its administrative subpoena. On July 5, 1994, while the subpoena enforcement action was pending, OSHA issued a willful citation and imposed a penalty of $9,000 on Sturm, Ruger

for its failure to provide Form 101s and the Log 200 for calendar year 1993. (App. 99a). Notably, at no time prior to July 5, 1994 did OSHA make a request to Sturm, Ruger limited to the Form 101s and the Log 200 for calendar year 1993.[3]

F. The Decision of the Magistrate Judge

On March 13, 1995, after multiple oral arguments and submission of multiple briefs, United States Magistrate Judge William H. Barry, Jr. issued a Report and Recommendation denying the Secretary of Labor's Application for enforcement of its administrative subpoena. (App. 42a). The Magistrate found that "(a)s defendant has pointed out, at the time OSHA sought certain documents from the defendant by use of a subpoena, OSHA had not promulgated any standards pertaining to ergonomics or were any in place from Congressional legislation." (App. 49a). The Magistrate added that "(h)eedful of the already complicated requirements associated with being in business, employers cannot be expected to adhere to policies or procedures not properly authorized. Irrefragably, allowing such unauthorized review or practices by government agencies would create " 'unbridled discretion' in the hands of inspection officers (citation omitted)." (App. 49a). Accordingly, the Magistrate concluded that OSHA's issuance of a subpoena was "without authority or legal support." (App. 56a). The Secretary of Labor subsequently filed Objections to the Report and the Recommendation. (Cir. App. 00008).

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3. In September 1994, OSHA issued a preliminary draft of its ergonomic standard. However, in June 1995, in part based upon confrontations with the new Congress, and the inherent difficulties of formulating an acceptable standard, the titular head of OSHA, Assistant Secretary of Labor Joseph Dear, notified the public that OSHA would not be issuing an ergonomic standard. The OSHA Local Area Director has terminated the NH Ergonomic LEP. Despite the same, OSHA continues to insist upon enforcement of its subpoena.

G. The Decision of the District Court

On August 4, 1995, without the benefit of oral argument, United States District Court Judge Steven J. McAuliffe entered an Order rejecting Magistrate Barry's Report and Recommendation and enforcing the Secretary of Labor's administrative subpoena. (App. 14a, 15a). Judge McAuliffe, ignoring Sturm, Ruger's argument that the NH Ergonomic LEP was a circumvention of the lawful rulemaking process prescribed by Congress, concluded that "the Secretary issued the subpoena for a proper purpose authorized by Congress, the information sought is relevant to that purpose and adequately described in the subpoena, and the Secretary followed statutory procedures in issuing the subpoena." (App. 39a). He also found that the citation, although arguably not lawful, was improperly before him. (App. 38a). Judgment with respect to this Order was entered on August 7, 1995. (App. 14a). On or about August 16, 1995, Sturm Ruger filed its Notice of Appeal. (Cir. 00221 *et seq.*).

H. The Decision of the Court of Appeals

On May 14, 1996, the United States Court of Appeals for the First Circuit, in an Opinion by Circuit Judge Selya, affirmed the ruling of the district court. (App. 1a). The court declined to address the issue as to whether the New Hampshire Ergonomic LEP was, in fact, an improperly implemented substantive rule initiated without notice and comment, circumventing established APA and OSHA rulemaking procedures, and, in so doing, divorced the enforcement of the administrative subpoena from the suspect OSHA inspection program. In effect, the court held that the motivation for the issuance of the subpoena was irrelevant in deciding whether the subpoena was issued for a purpose authorized by Congress. Additionally, the Court affirmed the district court's decision, on jurisdictional grounds, not to entertain the citation and penalty vacation issue. (App. 12a-13a).

REASONS FOR GRANTING THE WRIT

Congress has entrusted OSHA with broad investigative powers while, at the same time, placing special obligations upon OSHA to promulgate, in accordance with prescribed procedures, health and safety standards which take into consideration the views of stakeholders and other interested persons. In this case, OSHA improperly exercised its enforcement authority because it established a broad based inspection program targeting select employers for an investigation in an attempt to impose an *ad hoc* ergonomic standard upon them, without formal rulemaking. This misuse of OSHA's investigative powers is especially troubling because ergonomics is a subject which enjoys no national consensus and covers an extremely wide variety of alleged hazards. Thus, the enforcement program is an extraordinary use (and abuse) of government power which directly impact rights granted under the Fourth and Fifth Amendments to the United States Constitution, and considerations of fundamental fairness. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984). Thus, for the following reasons, this Court should grant the writ.

First, judicial enforcement of an administrative subpoena issued pursuant to an enforcement program, which did not comply with Congressional rulemaking requirements, is an abuse of process. *United States v. Powell*, 375 U.S. 48, 58 (1964); *United States v. Comley*, 890 F.2d 539, 543 (1st Cir. 1989). It was error for the First Circuit Court of Appeals to segregate the enforcement program from the subpoena. By upholding judicial enforcement of the Sturm, Ruger subpoena, the circuit court has established a precedent which will allow administrative agencies to create and enforce "rules" which have not been authorized by Congressional process and have not been subjected to the quasi-legislative process established through the OSH Act and the APA's notice and comment provisions. Such

a precedent grants executive administrative agencies *carte blanche* to create and enforce rules without legislative or judicial control, and runs afoul of the balance of powers envisioned by the United States Constitution between Congress and the executive. This is especially troubling in the instant matter because OSHA can now do by investigation what it failed to do by rulemaking.

Second, OSHA's reliance upon the General Duty Clause, § 654(a)(1), to establish broad based inspection programs gives that agency unbridled discretion to act in an arbitrary manner and allows it to avoid its Congressional mandate to promulgate standards. *Kastalon, Inc.*, 1986 OSHD (CCH) 27643 (OSHRC 1986). Without standards, employers will not have sufficient notice of their obligations. This situation creates a paradox: when OSHA is unable to promulgate a rule because of a lack of consensus, it can create local enforcement programs and circumvent rulemaking.

Third, the Court should take this opportunity to announce a limited rule, to ensure a person's constitutional right to require compulsory process without fear of penalty, that courts have the inherent power to vacate penalties imposed by unconstitutional agency action without requiring the victim to exhaust its administrative remedies before the miscreant agency. *See Leedom v. Kyne*, 358 U.S. 184 (1958).

I.

JUDICIAL ENFORCEMENT OF AN ADMINISTRATIVE SUBPOENA WHICH WAS ISSUED IN FURTHERANCE OF AN ILLEGAL AND IMPROPER AGENCY ENFORCEMENT PROGRAM IS AN ABUSE OF PROCESS.

A. The Subpoena Was Not Issued for a Proper Purpose

In order for a court to enforce an administrative subpoena, the agency must first show that (1) the subpoena is issued for a proper purpose authorized by Congress; (2) the information sought is relevant to the authorized purpose; (3) adequately described; and (4) proper procedures were followed in issuing the subpoena. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186, 208 (1946); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989). The agency bears the burden of demonstrating that its subpoena meets these requirements. *Comley*, 890 F.2d at 541-542.

In this case, OSHA states that it met this burden because it has broad authority to issue administrative subpoenas to investigate matters related to the health and safety of employees; that repetitive motion injuries to employees are a proper area of inquiry; that Sturm, Ruger and other New Hampshire employers were properly targeted for inspections; that the subpoena seeks information relevant to further that inquiry, that the documents are adequately described; and that proper procedures were followed in issuing the subpoena.

Sturm, Ruger responds that the subpoena could not have issued for a purpose authorized by Congress because Congress did not authorize OSHA to devise targeted inspection programs

that circumvent Congressional mandates requiring formal rulemaking; that the NH Ergonomic LEP is, in effect a substantive rule, promulgated in violation of the OSH Act and the APA, and that any subpoena issued in furtherance of the NH Ergonomic LEP is therefore improper. If the Fourth Amendment has any meaning, Sturm, Ruger is entitled to protection from this arbitrary and improper action.

A subpoena issued for an improper purpose is not entitled to judicial enforcement. *United States v. Powell*, 379 U.S. 48 (1964). In *Powell*, the Court noted that, during an IRS summons enforcement hearing, a court may "inquire into the underlying reasons" for issuing the summons, in order to insure that the court's process is not abused. The *Powell* Court continued:

> *Such an abuse would take place if the summons had been issued for an improper purpose*, such as to harass the taxpayer or to put pressure on him to settle a collateral dispute, *or for any other purpose reflecting on the good faith of the particular investigation.*

Powell, 379 U.S. at 58 (emphasis supplied). Thus, when an agency requests judicial enforcement of a subpoena issued for an improper purpose, such enforcement constitutes an abuse of process. Although the Supreme Court has only addressed the improper motive defense in IRS actions, the circuit courts have also applied or recognized the doctrine with respect to other administrative agencies. *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989) (investigation motivated by bad faith would not justify enforcement of Nuclear Regulatory Commission's subpoena); *Shasta Minerals & Chemical Company v. Securities and Exchange Commission*, 328 F.2d 285 (10th Cir. 1964) (subpoena issued for purpose of systematic persecution and

harassment would not be entitled to judicial enforcement).

The New Hampshire Ergonomic LEP was a substantive rule[4] adopted without notice or comment and in violation of the OSH Act and the APA.[5] The fact that OSHA does not call the program a "rule" is of no import. The Fifth Circuit Court of Appeals recognized, in *United States Department of Labor v. Kast Metals Corporation*, 744 F.2d 1145 (5th Cir. 1984), that a court "is not bound by an administrative agency's classification of its own action," so that "an agency cannot outflank either the strictures of its enabling legislation or the APA's rulemaking framework by definitional fiat." *Kast Metals*, 744 F.2d at 1149. Thus, a rule by any other name is still a rule.[6] The *Kast Metals* court further distinguished between substantive and procedural rules:

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4. A "rule" is defined under the APA as: "the whole or part of an agency statement of general or particular applicability and future design to implement, interpret, or prescribe law or policy", 5 U.S.C. § 551(4).

5. Specifically, the APA requires that administrative agencies provide notice of proposed *substantive* rulemaking and an opportunity for public comment prior to the promulgation, amendment or modification of a rule. 5 U.S.C. § 533. The OSH Act also provides for notice and comment. 29 U.S.C. § 655(b). In addition, the OSH Act provides that the Secretary may, as a preliminary step and prior to commencing the official rulemaking process, request the recommendations of an advisory committee. 29 U.S.C. § 655(b)(1).

6. The *Kast Metals* court recognized that the question of whether an agency action constitutes a "rule" within the meaning of the APA is significant because it not only implicates notice and comment requirements, but also affects the weight given to such agency action upon judicial review. *Kast Metals*, 744 F.2d at 1152. This is expecially important where there is a risk of citations being issued. *See Pepperidge Farm, Inc.*, 1993 WL 132982 (OSHRC March 25, 1993); *Beverly Industries, Inc.*, OSHRC Docket Nos. 91-3344 *et al.* (Oct. 17, 1995).

> When a proposed regulation of general applicability has a *substantial impact* on the regulated industry, or an important class of the members or the products of that industry, notice and opportunity for comment should first be provided.

Kast Metals, 744 F.2d at 1153 (citations omitted) (emphasis in original). Furthermore, as noted by the District of Columbia Circuit Court of Appeals in *American Hospital Association v. Bowen*, 834 F.2d 1037 (D.C. Cir. 1987), the exceptions to the APA's notice and comment requirements are to be narrowly construed. The NH Ergonomic LEP is a substantive rule because it seeks to impose new burdens upon targeted employers.

The ergonomic program established in New Hampshire significantly impacted the substantive rights of the targeted employers because the purpose of the program was to impose additional affirmative obligations on select employers. Thus, the New Hampshire Ergonomic LEP is distinguishable from other inspection programs which have been upheld as "rules of agency organization, procedure or practice" and exempt from the notice and comment requirements under 5 U.S.C. § 553(b)(A), because those inspection programs imposed no new substantive burden on targeted employers.[7] *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1 (1st Cir. 1982) (enforcement of warrant upheld for

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7. Certain investigatory acts are also exempted from the rulemaking requirements of the APA. *Environmental Defense Fund, Inc. v. Costle*, 636 F.2d 1229 (D.D.C. 1980). Notice and comment are not required for "agency investigatory activities preliminary to promulgating regulations," and which have "no immediate or direct effect on the [targeted] Companies or the general public," and do not "require any action on the part of the public or the Companies." *Id.* at 1255. Thus, a distinction can be drawn between a rule which imposes new, substantive obligations on employers, and an investigatory program which merely seeks information that may eventually lead to formal rulemaking.

established inspection program focused on high-hazard industry compliance with OSHA standards); *Kast Metals, supra* (enforcement of warrant upheld because procedural safety inspection of a steel castings plants did not substantially impact rights of employers because no imposition of new burdens), *Stoddard Lumber Company v. Marshall*, 627 F.2d 984 (9th Cir. 1980) (enforcement of OSHA inspection warrant upheld where injury rate in lumber industry was 1.8 times the national injury rate and program did not impose any new standard on targeted employer).

By contrast, the sole subject matter of the Sturm, Ruger subpoena is "ergonomic hazards," a subject which was, at the time, in the process of rulemaking. Because OSHA must concede that the New Hampshire Ergonomic LEP was the topic of substantive rulemaking, this Court, unlike those in *Wollaston Alloys, Kast Metals* and *Stoddard Lumber*, need not wrestle with the issue of whether this inspection program is a substantive or procedural rule. The fact that there is no extant ergonomic rule and there was ongoing rulemaking to establish national ergonomic standards is dispositive: the New Hampshire Ergonomic LEP was a substantive rule and required notice and comment prior to its implementation.

As is obvious, OSHA instituted the New Hampshire Ergonomic LEP in contravention of the notice and comment provisions of the APA and it's own enabling statute. The New Hampshire Ergonomic LEP was a substantive rule entitling the public to notice and opportunity for comment prior to its implementation. Thus, the Sturm, Ruger subpoena was authorized to further the unlawful New Hampshire Ergonomic LEP, and was not issued for a proper purpose. Absent a lawful basis, a subpoena issued pursuant to an unauthorized program, initiated with blatant disregard of the mandatory notice and comment requirements, is not entitled to enforcement. *See Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961).

B. OSHA Exceded its Congressional Authority When it Established the New Hampshire Ergonomic LEP.

An administrative agency possesses only those powers and duties delegated to it by Congress. The Supreme Court has repeatedly held that when an agency acts beyond the sphere of its delegation, it acts illegally. *Civil Aeronautics Board v. Delta Air Lines, Inc.*, 367 U.S. 316 (1961) (alteration of a certificate of public convenience and necessity without formal notice or hearing not authorized by Congress), *Social Security Board v. Nierotko*, 327 U.S. 358 (1946) (holding that the judiciary and not the agency decides the limits of its statutory power); *Stark v. Wickard*, 321 U.S. 288 (1944) (power of administrative agencies is limited by the authority granted).

Without question, OSHA was acting outside of its Congressional authority when it established the New Hampshire Ergonomic LEP. By not following its own enabling statute, which requires rulemaking prior to instituting and enforcing a substantive rule, OSHA was acting outside of its Congressional authority. Accordingly, the creation of the New Hampshire Ergonomic LEP constitutes illegal agency action. It must follow that any subpoena issued in furtherance of that illegal agency program is improper and not entitled to judicial enforcement as it is not authorized by Congress and not issued for a proper purpose. Thus, judicial enforcement of the Sturm, Ruger subpoena is an abuse of process.

II.

THE GENERAL DUTY CLAUSE WAS NOT CREATED BY CONGRESS TO ENABLE OSHA TO EVADE ITS' RULEMAKING RESPONSIBILITIES UNDER THE OSH ACT AND THE APA, AND, THUS, DOES NOT SAVE THE NH ERGONOMIC LEP OR SUBPOENA ISSUED PURSUANT TO THAT PROGRAM.

Both the circuit court and OSHA, in the proceedings below, ignored Sturm, Ruger's argument that the New Hampshire Local Emphasis Program was a substantive rule. Instead, OSHA claimed, and the court agreed, that the Area Director had authority, under the General Duty Clause, § 654(a)(1), to engage in this enforcement action. (However, both failed to appreciate the rule-like nature of the program, and its general application to a wide class of employers in the absence of a standard or employee complaint.) Congress, however, in no way meant for this section to supplant rulemaking required by both the APA and the OSH Act. Moreover, to allow such broad and arbitrary enforcement actions is tantamount to granting a license permitting any administrative agency with some executive enforcement power — and bureaucrats at all levels — to readily circumvent Congressionally mandated rulemaking procedures. This is especially troubling in the context of the instant dispute, where OSHA has failed to complete its rulemaking process, in part, due to the controversial nature of the subject matter and, in part, due to Congressional opposition.

As previously noted, under the OSH Act, employers have several duties and responsibilities. Under § 654(a)(1), employers must furnish employment and a place of employment which are free from recognized hazards[8] causing or likely to

8. The term "recognized hazards" received a concise definition in a floor speech by Representative Daniels when he proposed an amendment (Cont'd)

cause death or serious physical harm to employees. Under § 654(a)(2) employers are under a duty to comply with occupational safety and health standards promulgated under the OSH Act. *See* § 655(a)-(c) (outlining specific rulemaking procedures). To ensure compliance, Congress granted OSHA, under § 657(a), the right to enter an employer's place of business to inspect and investigate pertinent conditions, under § 657(b), to require the production of evidence and to have persons answer questions under oath, and under § 657(f), to conduct inspections in response to employee complaints. In the instant case, the inspection was not conducted under § 657(f), as there was no employee complaint. As OSHA has yet to promulgate an ergonomic standard under § 655(a)-(c), the inspection was not to determine compliance with § 654(a)(2). Rather, the Area Director conducted a targeted, involuntary administrative inspection program, limited to "ergonomic hazards". In effect, on the pretext of determining compliance with § 654(a)(1), OSHA evaded its rulemaking responsibilities by developing a general administrative inspection program, limited to the discovery and elimination of ergonomic hazards.

(Cont'd)
which became the present version of the General Duty Clause:

> A. A recognized hazard is a condition that is known to be hazardous, and is known not necessarily by each and every individual employer but is known taking into account the standard of knowledge in the industry. In other words, whether or not a hazard is "recognized" is a matter for objective determination; it does not depend on whether the particular employer is aware of it. 116 Cong. Rev. (Part 28) 38377 (1970). The standard would be the common knowledge of safety experts who are familiar with the circumstances of the industry or activity in question.

National Realty And Construction Company, Inc. v. OSHRC, 489 F.2d 1257, 1265 at n. 32 (D.C. Cir. 1973).

In *Kastalon, Inc.*, 1986 OSHD (CCH) 27643 (OSHRC 1986), OSHA sought to use § 654(a)(1) to cite an employer for allegedly exposing its employees to a suspected human carcinogen that had been the subject of an invalidated OSHA standard. Noting that it was "troubled, as were the judges, by the Secretary's apparent attempt to enforce an invalidated standard through citations under the general duty clause," the OSHRC further stated:

> The Act's legislative history shows that Congress intended that the Secretary would primarily rely on specific standards, rather than the broad mandate of the general duty clause, to seek the correction of workplace hazards. See S. Rept. No. 91-1282, 91st Cong., 2d Sess. (1970) at 9-10, reprinted in Senate Committee on Labor and Public Welfare, 92 Cong., 1st Sess. Legislative History of the Occupational Safety and Health Act of 1970, at 149-50 (Comm. Print, 1971); remarks of Rep. Steiger on conference bill, Id. at 1217 ("general duty requirements should not be used set *ad hoc* standards"); *Brisk Waterproofing Co.*, 73 OSAHRC 30/ E1, 1 BNA OSHC 1263, 1264, 1973-74 CCH OSHD 16,345, p. 21,261 (No. 1046, 1973). "Reliance upon the general duty clause was discouraged because to do so would provide little advance warning of what specifically is required in order that employers could maintain a safe and healthful workplace" . . . . Particularly in a situation like this, where a standard has been proposed and rulemaking proceedings have been conducted, the Secretary's failure to

> complete the rulemaking, coupled with his issuance of citations under the general duty clause, do not promote the goals of "fairness and mature consideration of rules of general application" that the Act's rulemaking provisions were designed to foster.

Id. at 35,971-35,971 (citing *NLRB v. Wyman Gordon Co.*, 394 U.S. 759, 764 (1969)).[9] While the issues herein are not identical to those presented to the OSHRC in *Kastalon, supra,* the principles are applicable, and the result must be the same — a finding that OSHA's conduct cannot be sustained.

This is not to say OSHA can never perform an inspection pursuant to an administrative inspection program under § 654(a)(1) where it has engaged in rulemaking but failed to enact a standard. If, unlike, the instant case, there was a national consensus standard clearly identifying the recognized hazard posing significant risk to employees and agreed upon abatement methods to eliminate exposure to the hazard, there would not be the same unfair imposition of a substantive burden found in this case. For example, in *American Smelting and Refining Company v. OSHRC,* 501 F.2d 504 (8th Cir. 1974), OSHA cited an employer for violating § 654(a)(1) for overexposing employees to lead. Although there was no lead OSHA standard and OSHA was undergoing rulemaking, lead had long been understood to be a recognized industrial hazard and there has been an accepted nationally recognized permissible exposure limit for many years prior to the inspection.

Obviously, ergonomic hazards do not rest on the same footing as lead hazards. Not only is there no present OSHA

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9. The citation was ultimately vacated by the OSHRC because OSHA failed to establish that a "suspected human careinogen" poses significant risk of harm to employees and is a recognized hazard.

standard, there has never been anywhere near a national consensus on the subject of ergonomics. And for that reason, rulemaking has stalled. In addition, unlike *American Smelting, supra,* where a single identifiable hazardous substance is in issue, almost all forms of human industry create a potential ergonomic hazard. Accordingly, for the reasons set forth in both *Kastalon, Inc., supra,* and *American Smelting, supra,* as well as overriding policy considerations, the inspection program must be held invalid and subpoena unenforceable.[10]

III.

THIS COURT HAS JURISDICTION TO VACATE THE CITATION ISSUED TO STURM, RUGER FOR FAILURE TO COMPLY WITH THE SUBPOENA.

During the pendency of the subpoena enforcement action, OSHA issued Sturm, Ruger a citation for refusing to turn over certain records included within the administrative subpoena. This action is unconstitutional, as it violates express holdings of this Court. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 416 (1984) (an employer may "question the reasonableness of [a] subpoena before suffering any penalties for refusing to comply with it, by raising objections in an action in the district court"); *See v. City of Seattle,* 387 U.S. 541, 545 (1967) (same); *Oklahoma Press Pub. Co. v. Walling,* 327 U.S. 186 (1946). *See also Brock v. Emerson Electric Co. Electronic Space Div.*, 834 F.2d 994, 997 (11th Cir. 1987) ("Under the Fourth Amendment, an employer may require OSHA to issue a subpoena and may

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10. In light of the fact courts have deemed promulgated OSHA standards unenforceable and void when they are vague, *(Kropp Forge Company v. Secretary of Labor,* 657 F.2d 119 (7th Cir. 1951) cited in *Secretary of Labor v. R. Zoppo Co., Inc.*, OSHRC Docket No. 94-1338 (August 16, 1995)), how can OSHA's underlying targeted inspection and enforcement action be deemed lawful where there is neither a standard nor consensus?

seek judicial involvement by refusing to honor the subpoena prior to its judicial enforcement. The employer may not be given a citation for asserting this constitutional right."). Accordingly, both the district court and the circuit court agreed that "it is questionable whether OSHA citations issued for failure to comply with a subpoena that the employer is in the process of challenging may be enforced." (App. 12a, 37a). The district court concluded that "the validity of the citation is certainly suspect." (App. 37a).

However, both the district court and the court of appeals also concluded that although it is unlawful to penalize a party for resort to compulsory judicial process, they nonetheless lacked primary jurisdiction to hear the issue, and could only exercise appellate jurisdiction. While these courts are correct that under ordinary circumstances, original jurisdiction to hear cases involving contested citations rests with OSHA, in the instant case, this Court should exercise its inherent power to remedy a constitutional violation because: 1) the conduct of the agency in penalizing the employer for asserting its rights was unconstitutional; 2) the agency itself was seeking the aid of the court to enforce the subpoena, and 3) the parties were already properly before the court. Thus, in essence, Sturm, Ruger found itself before the district court at OSHA's behest and was denied the opportunity then and there to challenge the constitutionality of OSHA's actions pursuant to the very rights granted by this Court. This Court should take this opportunity to establish a judicial remedy for violation of this Court-recognized right. In *Leedom v. Kyne*, 358 U.S. 184 (1958), this Court held that where a "right" has been given, "it must be held that . . . that right [may] be enforced, and 'the courts . . . encounter no difficulty in fulfilling its purpose' (citation omitted)," even without exhaustion of the administrative process. Accordingly, as it would be improper to deny the respondent judicial relief, this Court should extend its jurisdiction to vacate the citation and penalty.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT DATED MAY 14, 1996

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 95-1918

UNITED STATES OF AMERICA,

Petitioner, Appellee,

v.

STURM, RUGER & COMPANY, INC.,

Respondent, Appellant.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

[Hon. Steven J. McAuliffe, *U.S. District Judge*]

Before

Selya, Stahl and Lynch,

Circuit Judges.

Richard D. Wayne with whom *Willard Krasnow, Lara SanGiovanni*, and *Hinckley, Allen & Snyder* were on brief, for appellant.

Appendix A

Frederick D. Braid, Walter J. Johnson, Sharon N. Berlin, Rains & Pogrebin, P.C., Daniel J. Popeo, and *David A. Price* on brief for Washington Legal Foundation, amicus curiae.

John Shortall, Attorney, United States Dep't of Labor, with whom *Joseph M. Woodward* and *Ann Rosenthal,* United States Dep't of Labor, *Paul M. Gagnon,* United States Attorney, and *Gretchen Leah Witt,* Assistant United States Attorney, were on brief, for appellees.

May 14, 1996

SELYA, ***Circuit Judge.*** On the surface this case appears to touch a sensitive nerve: how the Occupational Safety and Health Act (OSH Act), 29 U.S.C. §§ 651-678 (1994), interfaces with the field of ergonomics (the study and design of workplace environments and job tasks and their effects on employee health). Indeed, the respondent-appellant, Sturm, Ruger & Co. (Sturmco), and the amicus, the Washington Legal Foundation (WLF), deliberately frame the appeal in these terms; they entreat us to declare that the Occupational Safety and Health Administration (OSHA) lacks the authority to regulate ergonomics in the workplace through the medium of the OSH Act's general duty clause, *id.* § 654(a)(1), and to reverse the district court's order on that basis. We turn a deaf ear to these blandishments because close perscrutation of the record discloses that they are premature. This is no more than a run-of-the-mine administrative subpoena enforcement proceeding which presents no legitimate opportunity to dwell on cosmic truths.

Deeming it unwise to make a long prologue and to be short in the story itself, *cf.* 2 Maccabees 2:32, we omit any further introduction and proceed directly to the particulars.

Appendix A

I. BACKGROUND

In August 1993 an OSHA representative arrived at Sturmco's factory in Newport, New Hampshire, to look into an employee complaint about air quality. But the visitor did more than test for air contaminants; he also informed Sturmco of a Local Emphasis Program (LEP) inaugurated by OSHA's area director. The LEP identified certain New Hampshire employers, based on the incidence of particular types of workers' compensation claims filed with a state agency, whom the area director believed might have an unusually high number of employees afflicted with multiple movement disorders. The OSHA emissary reported that Sturmco had been so identified and requested that it voluntarily produce certain records detailing work-related injuries and illnesses. Sturmco complied.

In November of the same year, the OSHA functionary returned to videotape employees engaged in one of Sturmco's manufacturing operations. He requested that the company complete a questionnaire that related to ergonomic issues at the factory. Sturmco took the matter under advisement and, in January, informed OSHA that it would not answer the questionnaire.

OSHA then served a subpoena demanding that Sturmco produce a myriad of documents concerning manufacturing processes, employee training, and on-the-job injuries. The company fenced with the agency, saying that it would comply with the subpoena only in the event that OSHA agreed not to use any of the resultant information to impose punitive sanctions. Refusing to accede to this condition, OSHA invoked 29 U.S.C. § 657(b) and obtained enforcement of the subpoena in the federal district court. *See Reich v. Sturm, Ruger & Co.*, 903 F. Supp. 239 (D.N.H. 1995). Sturmco appeals. We affirm.

Appendix A

II. SUBPOENA ENFORCEMENT

Although the parties — especially the respondent and the amicus — expend a great deal of energy debating the merits of ergonomic research and regulation, this exegesis is largely beside the point. The principal question before this court is much more mundane: did OSHA have the authority to issue the administrative subpoena? We hold that it did.

A

An administrative subpoena is not self-executing and is therefore technically not a "search." It is at most a constructive search, amounting to no more than a simple direction to produce documents, subject to judicial review and enforcement. *See Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 195 (1946); *In re Grand Jury Subpoena Served Upon Simon Horowitz*, 482 F.2d 72, 75-79 (2d Cir.), *cert. denied*, 414 U.S. 867 (1973). Thus, unlike the subject of an actual search, the subject of an administrative subpoena has an opportunity to challenge the subpoena before yielding the information. In the course of that resistance, the Fourth Amendment is available to the challenger as a defense against enforcement of the subpoena. *See Donovan v. Lone Steer, Inc.*, 464 U.S. 408, 415 (1984); *see generally* Jack W. Campbell IV, Note, *Revoking the "Fishing License,"* 49 Vand. L. Rev. 395, 408-09 (1996).

The requirements for enforcement of an administrative subpoena are not onerous.[1] In order to obtain judicial backing the

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1. We note that the subpoena at issue here seeks only corporate documents, and thus does not raise any of the concerns discussed in *In re Subpoena of Roger Gimbel*, 77 F.3d 593, 596-600 (2d Cir. 1996).

agency must prove that (1) the subpoena is issued for a congressionally authorized purpose, the information sought is (2) relevant to the authorized purpose and (3) adequately described, and (4) proper procedures have been employed in issuing the subpoena. *See United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950); *Oklahoma Press*, 327 U.S. at 208; *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989). As long as the agency satisfies these modest requirements, the subpoena is per se reasonable and Fourth Amendment concerns are deemed satisfied. *See Oklahoma Press*, 327 U.S. at 208. These standards apply to OSHA subpoenas in exactly the same way that they apply to subpoenas issued by other agencies. *See, e.g., Reich v. Manganas*, 70 F.3d 434, 437 (6th Cir. 1995); *Reich v. National Eng'g & Contr'g Co.*, 13 F.3d 93, 98 (4th Cir. 1993); *Dole v. Trinity Indus., Inc.*, 904 F.2d 867, 871 (3d Cir.), *cert. denied*, 498 U.S. 998 (1990); *Donovan v. Union Packing Co.*, 714 F.2d 838, 840 (8th Cir. 1983).

B

The respondent's central thesis boils down to this: the subpoena should not be enforced because OSHA issued it pursuant to an inspection scheme (the LEP) that did not derive from within OSHA's statutory authority. Sturmco casts this proposition in two modes. First, it focuses on the inspection scheme in the forlorn hope that we will apply to this subpoena the more stringent test applicable to administrative searches, namely, the requirement that on-site inspections be conducted pursuant to "reasonable legislative or administrative standards." *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 320 (1978).

We will not dance to the respondent's tune. At present, OSHA is not seeking to conduct an inspection or any other

physical search of Sturmco's premises, but, rather, merely to enforce a subpoena duces tecum.[2] The Supreme Court has made it pellucid that subpoenas - as opposed to inspections or other administrative searches are subject to the minimal standards of *Oklahoma Press* and its progeny, not to the more rigorous *Barlow's* criteria. *See Lone Steer*, 464 U.S. at 414. Thus, to the extent that Sturmco's animadversions are directed at whether the LEP drew its essence from a reasonable administrative standard, they have no bearing on the question we must decide.

C

In view of the frailty of its first asseveration, Sturmco's appeal necessarily stands or falls on its second argument, namely, whether issuing the subpoena was within OSHA's statutory authority. We think that it falls.

1. ***The Statutory Scheme.*** The OSH Act imposes two distinct duties on employers. First, employers must comply with specific workplace health and safety standards established by OSHA. *See* 29 U.S.C. § 654(a)(2). To this end, the Act grants OSHA authority to promulgate such standards .[3] *See id.* § 655.

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2. It is simply not true, as Sturmco seems to suggest, that OSHA may only issue subpoenas pursuant to inspections based on employee complaints. As the Eighth Circuit has observed: "The statute does not mandate an inspection of the premises in order to enforce a limited subpoena to determine whether there is a probable violation of the law. Indeed, the Secretary should not be expected to do more than the circumstances require." *Union Packing*, 714 F.2d at 840 (citation omitted).

3. Although OSHA has never established health and safety standards relating specifically to ergonomics, the agency at one point issued an advance proposed notice of rulemaking, requesting information and comments on

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Second, to fill whatever gaps may exist after rules delineating specific standards have been promulgated, the Act imposes on employers a general duty to provide "employment and a place of employment which are free from recognized hazards." *Id.* § 654(a)(1). OSHA enforces this general duty clause, as it is called, through case-by-case adjudicative proceedings. See id. § 661(i) (establishing administrative adjudication mechanism); *Puffer's Hardware, Inc. v. Donovan*, 742 F.2d 12, 17 (1st Cir. 1984) (holding that the Secretary does not abuse his discretion by issuing citations in adjudicative proceedings under the general duty clause as opposed to establishing specific standards via rulemaking); *see also Reich v. Montana Sulpher & Chem. Co.*, 32 F.3d 440, 445 (9th Cir. 1994) (noting "OSHA's statutory obligation to enforce the general duty clause as a minimum standard"), *cert. denied*, 115 S. Ct. 1355 (1995); *Matter of Establishment Inspection of Kelly-Springfield Tire Co.*, 13 F.3d 1160, 1167 (7th Cir. 1994) (acknowledging the Secretary's authority to enforce the general duty clause); *UAW v. General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) (limning the standards OSHA must meet to prove a violation of the general duty clause), *cert. denied*, 484 U.S. 976 (1987).

OSHA asserts as authority for the instant subpoena its power to investigate possible violations of the general duty clause. It is by now apodictic that enforcement of the general duty clause is a purpose properly authorized by Congress. *See, e.g., Montana Sulpher*, 32 F.3d at 449; *Kelly-Springfield*, 13 F.3d at 1166-67.

(Cont'd)
ergonomics from interested parties. *See* 57 Fed. Reg. 34,192 (Aug. 3, 1992). OSHA has yet to promulgate an official notice of proposed rulemaking adumbrating specific ergonomic standards.

2. ***"Recognized Hazards".*** In an effort to make an end run around these holdings, Sturmco and WLF question the validity of OSHA's purpose by positing that ergonomic hazards are not "recognized hazards" within the purview of the general duty clause. This initiative features two decisions in which administrative law judges (ALJs) under the auspices of the Occupational Safety and Health Review Commission (OSHRC) refused to enforce citations for particular ergonomic hazards under the general duty clause. *See Beverly Enters., Inc.*, OSHRC No. 91-3344 (A.L.J. 1995); *Pepperidge Farm, Inc.*, OSHRC No. 89-0265 (A.L.J. 1993). Sturmco and WLF insist that these decisions show that OSHA lacks the rudimentary authority to regulate ergonomics under the general duty clause. In the absence of any more specific regulatory authority, they conclude, OSHA cannot demonstrate a proper purpose for the issuance of the instant subpoena.

This conclusion is built on shifting sands. In the first place, neither of the cited ALJ decisions holds that OSHA lacks authority *in all instances* to regulate ergonomics under the general duty clause.[4] They therefore fail to provide convincing support for the proposition that OSHA will not be able to prove a violation of the general duty clause in this case. In the second place — and more important — the respondent's argument misconstrues the scope of the judicial inquiry that is appropriate at this stage.

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4. Both decisions are presently on review before OSHRC. In any event, because the cases are merely first-tier ALJ decisions, they are entitled to no precedential value before this tribunal. *See Matter of Establishment Inspection of Cerro Copper Prods. Co.*, 752 F.2d 280, 284 (7th Cir. 1985) (per curiam) ("An unreviewed ALJ decision does not bind OSHRC or the courts as precedent.") (citing cases). Their utility depends solely on the persuasive power, if any, of their reasoning.

Appendix A

We have repeatedly admonished that questions concerning the scope of an agency's substantive authority to regulate are not to be resolved in subpoena enforcement proceedings. *See FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987), *cert. denied*, 485 U.S. 987 (1988); *FTC v. Swanson*, 560 F.2d 1, 2 (1st Cir. 1977) (per curiam); *SEC v. Howatt*, 525 F.2d 226, 229-30 (1st Cir. 1975). Subpoena enforcement proceedings are designed to be summary in nature, *see Comley*, 890 F.2d at 541, and an "agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction," *Swanson*, 560 F.2d at 2. As long as the agency's assertion of authority is not obviously apocryphal, a procedurally sound subpoena must be enforced. *See id.; see also EEOC v. Kloster Cruise Ltd.*, 939 F.2d 920, 923 (11th Cir. 1991).

Refined to bare essence, the respondent's argument runs along the following lines. As part of its burden of proving a violation of the general duty clause, OSHA must show that an employer failed to keep its workplace free of a recognized hazard that caused (or was likely to cause) death or serious physical injury. *See General Dynamics*, 815 F.2d at 1577; *Puffer's Hardware*, 742 F.2d at 18. Ergonomic hazards, Sturmco argues, are not such "recognized hazards," and, therefore, OSHA cannot carry its burden. Given the early stage of the proceedings, this argument falters.

To be sure, a debate rages in both legal and medical circles over the dangers posed by, for example, multiple movement disorders, as well as over the optimum method(s) by which so-called ergonomic dangers can be alleviated. But uncertainties of this sort do not provide a cognizable basis for concluding *at this stage* that OSHA would not be able to issue a citation. This is especially true when, as now, a subpoena is "designed to produce

the very information that may be needed to shed light upon those questions." *Howatt*, 525 F.2d at 230.

3. ***A Variation on the Theme.*** WLF comes at the problem from another angle. It asserts that once a subpoena is enforced the chance for an effective challenge evaporates because most employers are likely to settle with OSHA rather than proceed through the rigors of the administrative litigation process. As an initial matter, we doubt that this argument is properly before us. While amicus briefs are helpful in assessing litigants' positions, an amicus cannot introduce a new argument into a case. *See Lane v. First Nat'l Bank*, 871 F.2d 166, 175 (1st Cir. 1989) (explaining that an amicus may not "interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore"); *accord Vote Choice, Inc. v. DiStefano*, 4 F.3d 26, 36 (1st Cir. 1993).

In all events, WLF's argument fails on the merits. It offers no empirical or statistical evidence in support of its conclusions about settlement rates. Moreover, it points to no case holding that the prospective burden of litigation constitutes a cognizable injury sufficient to breathe life into a pre-enforcement challenge to agency action notwithstanding the guaranteed availability of judicial review following final agency action. Put bluntly, WLF asks us to buy a pig in a poke, and we refuse to do so .

At any rate, we have already rejected a similar argument in repudiating an estoppel-based collateral attack on an OSHA citation. In *Northeast Erectors Ass'n v. Secretary of Labor*, 62 F.3d 37 (1st Cir. 1995), we held that a party did not suffer substantial harm from being required to raise defenses to a citation only after the citation had issued. *See id.* at 40. We also warned that permitting parties to circumvent the administrative

process by bringing collateral challenges in the district court would "subvert Congress's intent to have such claims reviewed through the OSH Act's detailed administrative procedure." *Id*.

4. *Recapitulation.* We need go no further. OSHA's authority to investigate ergonomic conditions in search of possible general duty clause violations easily passes the undemanding test for the enforceability of administrative subpoenas. Were we to succumb to the siren song that Sturmco sings and stop the subpoena for want of some sophisticated standard for systemically specifying ergonomic hazards, we would in effect be requiring OSHA to "charge first and investigate later." *Montana Sulpher,* 32 F.3d at 444. This tergiversation would stand the administrative enforcement process on its head and in the bargain would both defy the will of Congress and ignore the teachings of the Court. We will not encourage so resupinate an exercise.

D

We must attend to a final detail. While the respondent does not seriously contend that the documents requested in the subpoena are irrelevant to OSHA's asserted purpose or that the subpoena was issued in a procedurally irregular manner, it does attempt to argue that enforcement should be withheld because the subpoena is abusive and overbroad. On appeal, Sturmco's sole stated basis for this contention is that, because there is no ergonomic standard or definition of ergonomic hazard, any document request must necessarily be abusive. This is nothing more than a cross-dressing of the argument, previously rejected, that OSHA lacks authority to issue a subpoena pursuant to an investigation of ergonomic hazards for possible violations of the general duty clause. We can conceive of no reason to give this

importuning further attention. Accordingly, the subpoena must be enforced.

III. CITATION ENFORCEMENT

In July of 1994, while the respondent was in the midst of contesting the subpoena's validity, OSHA issued a citation charging the company with failure to produce certain subpoenaed documents. The respondent requested that the district court prohibit enforcement of the citation. The court refused, citing a perceived lack of jurisdiction. *See Sturm, Ruger,* 903 F. Supp at 250.

As the district court recognized, *id.* at 249-50, it is questionable whether OSHA citations issued for failure to comply with a subpoena that the employer is in the process of challenging may be enforced. *See, e.g., Lone Steer,* 464 U.S. at 415 (explaining that an employer may "question the reasonableness of [a] subpoena, *before suffering any Penalties for refusing to comply with it,* by raising objections in an action in the district court") (emphasis supplied); *See v. City of Seattle,* 387 U.S. 541, 544-45 (1967) (similar); *Brock v. Emerson Elec. Co.,* 834 F.2d 994, 997 (11th Cir. 1987) (similar); But as the district court also recognized, *Sturm, Ruger,* 903 F. Supp. at 250, the law lodges exclusive jurisdiction over challenges to the validity of citations with OSHRC, subject to review by the court of appeals. *See* 29 U.S.C. §§ 659(c) & 660(a); *see also Northeast Erectors,* 62 F.3d at 39-40 (explaining jurisdictional structure of OSH Act and holding that the district court lacked subject matter jurisdiction over a pre-enforcement challenge to an OSHA citation).

The OSH Act provides only a few limited bases for original

jurisdiction in the district court, and none of those bases exists here. The administrative review and appeals process thus remains "the exclusive procedure through which an employer can obtain review of OSHA [citation] enforcement proceedings." *Northeast Erectors*, 62 F.3d at 39.[5] Consequently, the district court did not err in refusing, on jurisdictional grounds, to entertain Sturmco's complaint anent the citation.

IV. CONCLUSION

There is much less to this appeal than meets the eye. Because OSHA had authority to issue the subpoena to investigate possible violations of the general duty clause, we must affirm the judgment below. In so doing, we leave for another day the question whether OSHA will ultimately be able to enforce a citation against Sturmco (or anybody else, for that matter) on the ground that ergonomic hazards are recognized hazards within the meaning of the OSH Act's general duty clause.

Affirmed.

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5. Sturmco is currently contesting the citation before OSHRC, and it will be entitled to all appropriate defenses against enforcement there and on any ensuing appeal. *See, e.g., Emerson Elec.*, 834 F.2d at 997 (affirming OSHRC's vacation of citation issued for failure to produce documents). That route is the only available avenue of protest vis-a-vis the citation.

APPENDIX B — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED AUGUST 7, 1995

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil Action No. 1:94-cv-00373-M

USA

v.

Sturm Ruger & Co

JUDGMENT

JUDGMENT is hereby entered in accordance with the order dated August 4, 1995, of U.S. District Judge Steven J. McAuliffe. (Signed by Clerk James R. Starr)

By the Court,

s/ Ann Mulner
Deputy Clerk

Date: August 7, 1995

cc:

David L. Baskin, Esq.
Gretchen Leah Witt, Esq.
Richard D. Wayne, Esq.
Jeremy Ritzenberg, Esq.

APPENDIX C — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE FILED AUGUST 4, 1995

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE

Civil No. 94-373-M

Robert B. Reich, Secretary of Labor, United States Department of Labor,

Plaintiff,

v.

Sturm, Ruger & Co., Inc.,

Defendant.

ORDER

The Secretary of Labor filed suit to enforce an administrative subpoena served upon Defendant, Sturm, Ruger & Co., Inc. (the "Company"). The Company operates a firearms manufacturing plant in New Hampshire. The subpoena directed the Company to produce records and information related to potential workplace hazards that might be linked to multiple movement disorders, like carpal tunnel syndrome. Specifically, the Secretary sought to obtain the Company's 1993 "OSHA 200 logs" and first report of injury logs. It also requested information or records relating to: (1) employee task completion times; (2) quotas; (3) piece work; (4) incentives; (5) production; (6) the Company's ergonomics-related concerns, committees, and consultants; and (7) employee task variation.

Appendix C

The Company is required by law to maintain only the OSHA 200 logs. Nevertheless, the Secretary claims to be entitled to all of the subpoenaed records and information under the provisions of the Occupational Safety and Health Act of 1970, 29 U.S.C. §651, *et seq.* (the "Act"). The Company objects to enforcement of the subpoena and moves to vacate an administrative citation and fine which the Secretary imposed for its refusal to produce the Form 200 logs.

On September 1, 1994, the Magistrate Judge (Barry, J.) conducted a hearing on this matter, after which he allowed the parties 15 days to submit additional legal and factual support for their respective positions. On March 13, 1995, the Magistrate Judge issued a Report and Recommendation, recommending that the court deny the Secretary's application for an order enforcing the administrative subpoena. The Secretary filed a timely objection to the Magistrate's Report and Recommendation. Pursuant to 28 U.S.C. §636(b)(1), the court reviews *de novo* those portions of the Report and Recommendation to which a party has objected.

Factual Background.

The Magistrate Judge made the following findings of fact, which are well-supported in the record. On November 1, 1992, the New Hampshire OSHA area director developed a Local Emphasis Program for the inspection of industries that experience a high incidence of multiple movement disorders, such as carpal tunnel syndrome and tendinitis. On December 31, 1992, the area director obtained a computer printout from the New Hampshire Bureau of Workers' Compensation detailing first reports of injury/illness. From that data, the area director developed a list of employers who seemed to be experiencing

frequent workers' compensation claims based on incidents of multiple movement disorder. The Company had the third highest number of such claims in New Hampshire.

By letter dated August 17, 1993, the area director advised the Company of OSHA's general interest in reducing and/or eliminating ergonomic hazards related to multiple movement disorders. He also informed the Company of New Hampshire's Local Emphasis Plan, and its directive to investigate the significant increase in reports of multiple movement disorders. Finally, he explained how and why the Company's plant had been selected for inspection. On the same day, OSHA Compliance and Health Officer Donald DeWees, who was responding to an earlier employee complaint regarding alleged air quality hazards at the Company's plant, went to the plant to inspect *both* air quality and ergonomics.

DeWees returned to defendant's plant on November 12, 1993, to inspect the "Checking and Polishing Departments," where employees had sustained a comparatively large number of multiple movement disorders. DeWees asked the Company to provide him with particular information related to that type of injury. On December 20, 1993, representatives of the Company informed DeWees that such information would not be released, and instead referred him to the Company's attorneys. On January 11, 1994, the Secretary issued the administrative subpoena in question, but the Company again refused to produce the requested information and records. On January 19, 1994, the Company's attorney offered, by way of compromise, to produce the requested records and information, provided that OSHA agreed not to use any of it as a basis for an enforcement action against the Company. OSHA rejected the offer and brought suit to enforce the subpoena.

Appendix C

The Company argues that the subpoena violates its rights under the Fourth Amendment to be free from unreasonable searches and seizures. The Company claims that the subpoena is unenforceable because it was not issued "for a proper purpose authorized by Congress," *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989). Finally, it challenges the subpoena on grounds that the Secretary cannot properly subpoena records or information relating to ergonomics because he has not promulgated any health and safety regulations on that subject.

Discussion.

I. *Constitutional Law.*

In *Marshall v. Barlow's, Inc.*, 436 U.S. 307 (1978), the Supreme Court held that the Fourth Amendment protects commercial buildings as well as private homes from unreasonable searches and seizures. The court also concluded that, despite the broad language of section 8(a) of the Act, the Secretary of Labor could not conduct a warrantless search of Barlow's business. *Barlow's*, 436 U.S. at 311. The court noted, however, that demonstrating "probable cause" sufficient to support the issuance of a warrant is less burdensome in the administrative inspection context than in the criminal search context.

> [The Secretary's] entitlement to inspect will not depend on his demonstrating probable cause to believe that conditions in violation of OSHA exist on the premises. Probable cause in the criminal law sense is not required. For purposes of an administrative search such as this, probable cause justifying

> the issuance of a warrant may be based not only on specific evidence of an existing violation but also on a showing that "reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment]."

Barlow's, 436 U.S. at 320 (quoting *Camara v. Municipal Court of San Francisco*, 387 U.S. 523, 538 (1967)); *see also Brock v. Brooks Woolen Co.*, 782 F.2d 1066, 1069 (1st Cir. 1986) ("In the case of an administrative search warrant, . . . the probable cause required to secure the warrant is less than that necessary for a criminal warrant.").

However, even the weaker probable cause standard applicable to administrative *searches* does not govern the issuance of an administrative *subpoena*. In *Donovan v. Lone Steer, Inc.*, 464 U.S. 408 (1984), the court distinguished prior cases, including *Barlow's*, and explained that the standard applicable to subpoenas is even less burdensome:

> In each case [i.e., *Barlow's*, *supra*, *Camara v. Municipal Court*, *supra*, and *See v. Seattle*, 387 U.S. 541 (1967)], this Court held that an administrative warrant was required before such a search could be conducted without the consent of the owner of the premises. It is plain to us that those cases turned upon the effort of the government inspectors to make nonconsensual entries into areas not open to the public. As we have indicated, no such entry was made by appellants in this case.

> Thus the enforceability of the administrative subpoena *duces tecum* at issue here is governed, not by our decision in *Barlow's* as the District Court concluded, but rather by our decision in *Oklahoma Press Publishing Co. v. Walling*, 327 U.S. 186 (1946).

Lone Steer, 464 U.S. at 414. In *Oklahoma Press*, *supra*, the court rejected an employer's claim that the subpoena power conferred upon the Secretary of Labor by the FLSA violates the Fourth Amendment:

> Without attempt to summarize or accurately distinguish all of the cases, the fair distillation, in so far as they apply merely to the production of corporate records and papers in response to a subpoena or order authorized by law and safeguarded by judicial sanction, seems to be that the Fifth Amendment affords no protection by virtue of the self-incrimination provision, whether for the corporation or for its officers; and the Fourth, if applicable, at the most guards against abuse only by way of too much indefiniteness or breadth in the things required to be "particularly described," if also the inquiry is one the demanding agency is authorized by law to make and the materials specified are relevant. The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable.

Oklahoma Press, 327 U.S. at 208.

Appendix C

Four years later, the court considered the nature and scope of the Federal Trade Commission's authority to require corporations to file reports showing the extent to which they have complied with the Commission's cease and desist order. *United States v. Morton Salt Co.*, 338 U.S. 632 (1950). Like the Company in this case, the corporations argued that because the Commission had not alleged a violation of its order or of any relevant statute, its document request constituted nothing more than a "fishing expedition," designed to uncover evidence of guilt. The court rejected that argument:

> The only power that is involved here is the power to get information from those who best can give it and who are most interested in not doing so. Because judicial power is reluctant if not unable to summon evidence until it is shown to be relevant to issues in litigation, it does not follow that an administrative agency charged with seeing that the laws are enforced may not have and exercise powers of original inquiry. It has a power of inquisition, if one chooses to call it that, which is not derived from the judicial function. It is more analogous to the Grand Jury, which does not depend on a case or controversy for power to get evidence but can investigate merely on suspicion that the law is being violated, or even just because it wants assurance that it is not.

Morton Salt, 338 U.S. at 642-43. The court did acknowledge some limits on an administrative agency's investigatory powers, but still made it clear that those powers are far-reaching:

> Of course a governmental investigation into corporate matters may be of such a sweeping nature and so unrelated to the matter properly under inquiry as to exceed the investigatory power. But it is sufficient if the inquiry is within the authority of the agency, the demand is not too indefinite and the information sought is reasonably relevant. "The gist of the protection is in the requirement, expressed in terms, that the disclosure sought shall not be unreasonable."

Morton Salt, 338 U.S. at 652-53 (quoting *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946)).

The Supreme Court's rulings in this area seem to yield the following maxim: an administrative subpoena is "reasonable" and, therefore, enforceable if it is issued for a proper purpose authorized by Congress, the information sought is relevant to that purpose and adequately described, and statutory procedures governing its issuance are followed. *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989). The scope of this court's review of the reasonableness of an administrative subpoena is quite limited:

> The role of a court in a subpoena enforcement proceeding is strictly limited to inquiring whether the above requirements have been met. "Such proceedings are designed to be summary in nature. As long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably

> relevant, the district court must enforce an administrative subpoena."

Comley, 890 F.2d at 541 (quoting *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987)).

II. *The Occupational Safety and Health Act of 1970.*

Congress enacted the Occupational Safety and Health Act of 1970 in an effort, "to assure so far as possible every working man and woman in the Nation safe and healthful working conditions and to preserve our human resources." 29 U.S.C. §651(b). Consistent with that purpose, section 5(a) of the Act, 29 U.S.C. §654(a), mandates that:

> Each employer (1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees; (2) shall comply with occupational safety and health standards and all rules, regulations, and orders issued pursuant to this chapter which are applicable to his own actions and conduct.

29 U.S.C. §654 (a) Under this provision, an employer has two distinct legal obligations. Employers are required under section 5(a)(1) of the Act to provide a working environment free from recognized health and safety hazards, and they are required under section 5(a)(2) of the Act to comply with all pertinent standards promulgated by OSHA. Failure to comply with either of these duties constitutes a violation of the Act. *Cape &*

Appendix C

Vineyard Div. of New Bedford Gas v. Occupational Safety and Health Review Com., 512 F.2d 1148, 1150 (1st Cir. 1975). Because OSHA has not yet promulgated any safety and health regulation(s) regarding ergonomics, legal authority for the Secretary's inquiry into ergonomic conditions at the Company's facility is necessarily derived from section 5(a)(1) of the Act, the so-called "general duty clause."

Section 8(a) of the Act, 29 U.S.C. §657(a), empowers the Secretary to inspect and investigate workplaces in order to carry out the purposes of the Act. Section 8(b) of the Act, 29 U.S.C. §657(b), empowers the Secretary, in the course of conducting such inspections and investigations, to require the attendance and testimony of witnesses and the production of evidence under oath. It also authorizes the Secretary to subpoena records maintained by an employer. The parties do not dispute that OSHA may investigate potential general duty clause violations alleged in an employee's complaint. *See* 29 U.S.C. §657(f). The questions presented here are: (1) whether OSHA has the authority to subpoena documents which relate to *potential* workplace safety hazards well beyond the scope of an employee's specific complaint; and (2) whether, independent of any employee complaints, OSHA may subpoena documents as part of an investigation into potential general duty clause violations, whose existence is suggested only by data developed by a state agency.

A. *Employee Complaint Investigations.*

The Secretary may conduct two types of administrative inspections: programmed and unprogrammed. *See generally, In re Samsonite Corp.*, 756 F.Supp. 498, 499 (D.Colo. 1991). Programmed inspections are conducted as part of a

comprehensive enforcement scheme. Under a programmed inspection, an employer is randomly selected for inspection based upon neutral criteria. Unprogrammed inspections are triggered by specific evidence of potential violations of the Act, such as an employee complaint.

In this case, the Secretary initiated an unprogrammed investigation of the Company in response to an employee complaint related to air quality. The circuits are divided as to the permissible scope of administrative searches or inspections conducted in response to employee complaints. *Compare Donovan v. Sarasota Concrete Co.*, 693 F.2d 1061 (11th Cir. 3982) (holding that a search conducted following an employee complaint must bear an appropriate relationship to the violation alleged in the complaint); *Marshall v. Horn Seed Co.*, 647 F.2d 96 (10th Cir. 1983) (same); *Marshall v. North American Car Co.*, 626 F.2d 320 (3rd Cir. 1980) (same); *Marshall v. Central Mine Equipment Co.*, 608 F.2d 719 (8th Cir. 1979) (same) *with Hern Iron works Inc. v. Donovan*, 670 F.2d 838 (9th Cir.) (warrant authorizing inspection of entire plant in response to employee complaint not unreasonable), *cert. denied*, 459 U.S. 830 (1982); *Burkart Randall Division of Textron, Inc. v. Marshall*, 625 F.2d 1313 (7th Cir. 1980) (inspection in response to employee complaints need not be limited in scope to substance of those complaints). *See also* 29 CFR §1903.11 ("Inspections under this section shall not be limited to matters referred to in the complaint"). But in this case, the court is concerned with the permissible scope of an administrative *subpoena* issued in response to an employee complaint, not a search warrant.

For the reasons given in *Dole v. Trinity Industries Inc.*, 904 F.2d 867 (3rd Cir.), *cert. denied*, 498 U.S. 998 (1990), the court finds that an administrative subpoena need not be limited to

materials directly relevant to the investigation of an employee's complaint. In *Trinity Industries*, OSHA responded to an employee complaint alleging that non-production employees were not provided with hard hats and safety glasses when walking through work areas. OSHA obtained a warrant authorizing an inspection of the plant, limited to the conditions described in the employee complaint. The warrant also authorized OSHA to inspect and copy certain records which the employer was required to maintain. When the employer refused to honor the warrant, OSHA issued an administrative citation and served an administrative subpoena, seeking both the information referenced in the warrant and additional documents. The employer refused to honor the subpoena and OSHA filed a petition to enforce it.

On appeal to the Court of Appeals for the Third Circuit, Secretary argued that the district court erred in limiting enforcement of the subpoena to those records related to the conditions described in the employee's complaint. Finding that the district court should not have limited the scope of the subpoena, the court pointed out that the subpoena met the requirements set forth in *United States v. Morton Salt Co., supra*, that is: (1) the inquiry was within the authority of the agency; (2) the demand for production was not too indefinite; and (3) the information sought was reasonably relevant to the inquiry the Secretary was authorized to conduct:

> These subpoenas were issued in connection with a limited workplace inspection following an employee complaint, but the information they seek does not have to be relevant to that particular inquiry in order to justify full enforcement. It is enough that the

> information sought is relevant to *any* inquiry that the Secretary is authorized by law to undertake. She is authorized to review the occupational health and safety records that employers are required to keep by the Act for her use, and the fact that she chooses to do so following an employee complaint does not diminish her power to subpoena the records that she requires.

Dole v. Trinity Industries, 904 F.2d at 874 (emphasis added).[1] The Court of Appeals for the Sixth Circuit recently followed suit in *Trinity Industries v. OSHRC*, 16 F.3d 1455 (6th Cir. 1994):

> Although the law in this Circuit seems to allow OSHA to use either a warrant or an administrative subpoena to inspect a company's injury and illness records, we agree with the Third Circuit that limiting the

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1. Although the facts presented in *Dole v. Trinity Industries, Inc.*, *supra*, are distinguishable from those presented here, the distinctions are not material. In *Trinity Industries*, the Secretary sought information necessary to calculate the employer's lost workday incidence ("LWDI"). If the LWDI was above the industry average, OSHA's internal handbook required the Secretary to expand the scope of the investigation beyond the allegations contained in the employee complaint. Here, the Secretary seeks to expand his investigation beyond the allegations contained in the employee's air quality complaint to determine whether the Company is complying with the duties imposed by section 5(a)(1), the general duty clause. A number of courts presented with this issue have held that such an augmented document review is within the Secretary's authority. *See. e.g.*, *Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 445-46 (9th Cir. 1994), *cert. denied*, 1995 U.S. LEXIS 2002, 63 U.S.L.W. 3689 (U.S. 1995); *Trinity Industries v. OSHRC*, 16 F.3d 1455, 1460-61 (6th Cir. 1994).

> scope of a physical inspection of a worksite while also allowing review of all injury and illness records is consistent with the goals and provisions of the Act.

Trinity Industries v. OSHRC, 16 F.3d at 1461. Accordingly, the Secretary's demand, through subpoena, for records the Company is not required to maintain by the Act for his use was proper and is enforceable.

In addition to documents which the Company is required by law to maintain, here the Secretary also seeks documents which the Company is *not* required to maintain. With regard to those documents, the court finds that the Secretary's subpoena was also reasonable and constitutionally sound. In *Donovan v. Union Packing Co.*, 714 F.2d 838 (8th Cir. 1983), the Court of Appeals for the Eight Circuit reached a similar conclusion, holding:

> Disclosure of forms required by [the Act] *and of several other standard records* through the enforcement of the Secretary's subpoena power is hardly unreasonable. As the district court in *Marshall v. Olean Title Co.*, 489 F.Supp. 32 (E.D.Pa.), *aff'd* 636 F.2d 1209 (3d Cir. 1980), noted, "[t]he varied responsibilities delegated to the Secretary define the breadth of his subpoena power." 489 F.Supp. at 34. The Secretary is not only authorized to conduct full-scale investigations to ensure compliance with OSHA, he is also authorized to conduct more limited preliminary investigations to determine if a company meets the criteria

established for a programmed inspection; criteria which, if met, suggest that further investigation may reveal violations of OSHA law.

Union Packing, Co., 714 F.2d at 842 (emphasis added).

"Reasonableness" remains the standard against which the Secretary's subpoena must be measured. *Oklahoma Press Pub. Co. v. Walling*, 327 U.S. 186, 208 (1946); *See v. Seattle*, 387 U.S. 541, 544 (1967); *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989); *see also Martin v. Gard*, 811 F.Supp. 616, 620 (D.Kan. 1993) ("In an action to enforce an administrative subpoena, judicial review is limited and conducted summarily .... The gist of this Fourth Amendment protection is reasonableness, in that the subpoena must be 'sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome.' " (citations omitted)). Accordingly, the danger of abuse and degree of intrusiveness associated with the Secretary's document request must be balanced against the need for inspection.

Here, the court is persuaded that, on balance, the circumstances warrant enforcement of the subpoena. Given the strong federal interest in promoting employee health and safety, as well as the data suggestive of a potential relationship between working conditions at the Company and multiple movement disorders experienced by its employees, the Secretary's request for information that might shed some light on possible causes of the injuries was reasonable. The materials sought were well defined, limited in scope, and related to the purpose of the inquiry: to determine if indeed a causal link between injuries and

working conditions existed. Compliance should not be unreasonably burdensome in that the Company presumably can easily retrieve and produce the material sought.

B. *"Programmed" Inspections.*

Approaching the issue from a somewhat different angle yields the same result. As noted above, section 8(a) of the Act authorizes the Secretary to conduct investigations pursuant to an administrative plan.[2] Here, the Secretary based his subpoena of

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2. The Court of Appeals for the Third Circuit recently interpreted the Secretary's investigatory powers under section 8(a) more broadly, holding that they are not necessarily linked to an administrative plan.

> [N]othing in it or any Supreme Court decision confines section 8(a) inspections to programmed inspections pursuant to an administrative plan. The language of section 8(a) suggests a broad grant of authority to the Secretary to conduct reasonable inspections in that it permits entry to any establishment "or other area" to inspect "any such place of employment and all pertinent conditions." 29 U.S.C. §657 (a). The statute is notably devoid of any requirement that inspections be made pursuant to an administrative plan or scheme; Congress could have indicated as much if it intended this restriction. In fact, the legislative history supports the interpretation that section 8(a) is a broad grant of authority to conduct reasonable inspections, in contrast to section 8(f)(1), which is not a grant of authority but rather imposes a requirement that the Secretary inspect under certain circumstances.

Martin v. International Matex Tank Terminals-Bayonne, 928 F.2d 614, 621 (3rd Cir. 1991).

documents upon just such a plan — the Local Emphasis Program ("LEP") — for the inspection of industries that experience high rates of multiple movement disorders. The LEP establishes procedures for carrying out:

> programmed inspections of targeted establishments from a list of referrals obtained from the State of New Hampshire's Workers' Compensation records pursuant to the provisions contained in the Field Operations Manual Ch. 11.E.2.b.4.
>
> * * *
>
> Targeting under the LEP would be accomplished by working closely with the State of New Hampshire using workers' compensation records and summaries of claims involving carpal tunnel syndrome and tendinitis compiled by company name over a time period of at least a year. Inspections would be conducted starting with those establishments having the greatest number of claims in that time period. The inspections would be conducted by CSHOs who have completed training in ergonomic problems.

Concord Area Office Notice CPL 2, Local Emphasis Program, Ergonomic, at 1 (Exhibit 1 to the Secretary's Application).

Pursuant to the LEP, OSHA's Area Director, David May, obtained information from the New Hampshire Bureau of Workers' Compensation regarding "first report of injury/illness

workers' compensation cases" for the period July 1, 1991, through June 30, 1992. Based upon his review of that and other data, Mr. May made the following conclusions:

1. The Company makes fabricated products, work which is coded under the standard industrial classification ("SIC") as number 34.

2. For fiscal years 1991 and 1992, the combined incidence rate of carpal tunnel syndrome in New Hampshire for SIC 34 was 21.8 injuries per 10,000 person-years.

3. For fiscal years 1991 and 1992, the average incidence rate of carpal tunnel syndrome for New Hampshire employers was 7.8 per 10,000 person-years.

4. Claims filed by employees of the Company constituted approximately one-half of all carpal tunnel syndrome claims filed by employees in SIC 34.

5. The Company had the third largest number of claims in the State of New Hampshire for carpal tunnel syndrome.

Affidavit of David May, paras. 3-9. Therefore, May concluded that the Company was part of an industry in which reports of multiple movement disorders were substantially higher than the average for all industries, and that employees of the Company accounted for a sizable portion of those reports. In light of the directive established by the LEP, May concluded that further investigation of the Company was appropriate.

The question presented, then, is whether the data

assimilated and analyzed by May was sufficiently neutral to permit issuance of an administrative subpoena consistently with constitutional safeguards. The court concludes that the data was sufficiently neutral, and that enforcement of the subpoena would not run afoul of any constitutional guarantees or protections.

In *In re Establishment Inspection of Gilbert & Bennett Mfg. Co.*, 589 F.2d 1335 (7th Cir.), *cert. denied sum nom., Chromalloy American Corp., Federal Malleable Div. v. Marshall*, 444 U.S. 884 (1979), the Court of Appeals for the Seventh Circuit considered whether a magistrate judge had properly issued an inspection warrant, authorizing OSHA to inspect appellant's foundry. Applying the criteria established in *Barlow's*, the court concluded that sufficient probable cause existed to justify the issuance of the warrant, the Secretary having adequately demonstrated that he sought the inspection warrant based upon "neutral criteria."

> Paragraph 9 [of the affidavit submitted in support of the warrant] supplied additional pertinent information, namely that the inspection was part of a "National-Local plan designed to achieve significant reduction in the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry."

Gilbert & Bennett Mfg. Co., 589 F.2d at 1342. Explaining why the warrant was properly issued, the court stated:

> Here, although a direct statistical correlation between injury rates and the foundry industry was not presented, the magistrate was

> entitled to assume, as was Congress in passing the Occupational Safety and Health Act, a direct connection between injuries and violative hazards. Moreover, the magistrate could rely on the known expertise of the Secretary in gathering the statistics in the area of occupational injuries and his ability to form a reasoned opinion that this rate indicated a "high incidence" of injuries in the foundry industry. Not to allow inspections of individual foundries, given such a background, would eviscerate the Act and its purposes. Thus, the instant warrant was plainly supported by probable cause in the *Camara/Barlow's* sense since Chromalloy was selected for inspection not as the result of the "unbridled discretion" of a field agent, but rather, pursuant to "a National-Local plan" designed by agency officials for the purpose of reducing the high incidence of occupational injuries and illnesses found in the metal-working and foundry industry.

Gilbert & Bennett Mfg. Co., 589 F.2d at 1343.

Although this court is presented with an application to enforce an administrative subpoena rather than a warrant, the reasoning of *Gilbert & Bennett Mfg. Co.* remains persuasive. The Company was selected for inspection under the criteria established in the LEP, and based upon data collected by the New Hampshire Bureau of Workers' Compensation which suggested that: (1) the Company is a member of an industry in which the rate of multiple movement disorders is significantly higher than

average; and (2) the Company itself had a very high incidence of multiple movement disorders. The Company's selection was the product of a systematic, nonarbitrary process, and was not based upon the "unbridled discretion" of a field agent. *Donovan v. Hackney, Inc.*, 583 F.Supp. 773 (W.D. Okla. 1984), *aff'd* 769 F.2d 650 (10th Cir. 1985), *cert. denied* 475 U.S. 1081 (1986); *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 5-6 (1st Cir. 1982). "Because [the company's] records were sought based on the neutral criteria that the company was a member of a high hazard industry, the evils the Supreme Court sought to guard against in *Barlow's* are simply not present." *Donovan v. Union Packing Co.*, 714 F.2d 838, 841-42 (8th Cir. 1983).

Accordingly, the Secretary's subpoena is also enforceable as a reasonable exercise of his investigative powers under section 8(a) of the Act.

III. *The Company's Motion to Vacate.*

On July 5, 1994, the Secretary served the Company with a Citation and Notification of Penalty for willfully violating 29 CFR 1904.7 (i.e., refusing to provide the Secretary with the subpoenaed OSHA Form 200's). The Secretary imposed a penalty of $9,000.00 and informed the Company of its right to contest the citation and penalty. *See* 29 U.S.C. §659 (a).[3]

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3. In accordance with 29 U.S.C. §659 (a), the Citation and Notification of Penalty specifically provided:

> **Right to Contest** — You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates

(Cont'd)

Appendix C

The Company claims that, "[t]he Fourth Amendment prohibits issuance of a citation against an employer for refusal to produce such records unless and until OSHA has first obtained an enforcement order or warrant from a court of appropriate jurisdiction, and no such order has been issued." Defendant's Motion to Vacate Citation at 1. The Secretary responds that this court lacks jurisdiction to address the merits of the Company's motion because the Company failed to exhaust its administrative remedies.

The Act establishes the Occupational Safety and Health Review Commission (the "Commission") to resolve administrative disputes arising under the Act. 29 U.S.C. §§651(b)(3) and 661. The Commission is empowered to hear and resolve challenges to enforcement actions commenced by the Secretary. 29 U.S.C. §§651(b)(3), 659(a) and (c). Decisions of the Commission are subject to review by the court of appeals for the circuit in which the violation is alleged to have occurred. 29 U.S.C. §660(a).

The Company relies upon *Brock v. Emerson Elec. Co., Electronic & Space Div.*, 834 F.2d 994 (11th Cir. 1987) for the proposition that:

(Cont'd)

> without contesting the underlying violations. ***Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.***

Id. at 2 (emphasis in original).

> under the Fourth Amendment, an employer may require OSHA to issue a subpoena and may seek judicial involvement by refusing to honor the subpoena prior to its judicial enforcement. The employer may not be given a citation for asserting this constitutional right.

Id. at 997. The Company argues that this court, like the Court of Appeals for the Eleventh Circuit, should vacate the citation because the Company was constitutionally entitled to ignore the subpoena until the Secretary obtained a judicial order of enforcement.

The validity of the citation is certainly suspect under the rationale of *Emerson Elec. Co.*, and at least two Supreme Court opinions support the Company's basic premise:

> Thus although our cases make it clear that the Secretary of Labor may issue an administrative subpoena without warrant, they nonetheless provide protection for a subpoenaed employer by allowing him to question the reasonableness of the subpoena, before suffering any penalties for refusing to comply with it, by raising objections in an action in district court.

Donovan v. Lone Steer, Inc., *supra*, at 415; citing *See v. City of Seattle supra* at 544-545 (". . . the subpoenaed party may obtain judicial review of the reasonableness of the demand prior to suffering penalties for refusing to comply.")

But exclusive jurisdiction over defendant's challenge to the citation's validity has been conferred, at least in the first instance, upon the Commission, and then the courts of appeals. 29 U.S.C. §§659 (c) and 660(a). Of course *Emerson Elec. Co.* might be distinguishable in that the employer in that case properly challenged the citation by giving the Secretary notice of its intent to contest, litigating the matter before an administrative law judge, and properly invoking judicial review in the court of appeals. Here, however, the Company apparently failed to give timely notice of its intent to contest the citation, and did not seek review in the court of appeals, thereby rendering the citation "a final order of the Commission not subject to review by any court or agency." 29 U.S.C. §659(a). In short, the Company failed to exhaust its administrative remedies and waived its right to contest the citation and penalty. "Where Congress has designated a specific forum for the review of administrative action, that forum is exclusive, and a concerned party must exhaust his administrative remedies prior to seeking relief from the courts." *In re Restland Memorial Park*, 540 F.2d 626, 628 (3rd Cir. 1976) (citing *Whitney Nat'l Bank v. Bank of New Orleans*, 379 U.S. 411, 422 (1965)).

While the constitutional basis of the Company's motion to vacate the citation might arguably support some form of collateral attack, it is clear that this court is without jurisdiction to directly review the validity of the now "final order" of the Commission, as the Company's motion to vacate requests. The only controversy properly before this court at this time is the one related to the enforceability of the subpoena issued by the Secretary. *See* 29 U.S.C. §657(b) (vesting jurisdiction in the district courts to review and enforce subpoenas issued by the Secretary). Accordingly, the Company's motion to vacate the citation and penalty is necessarily denied.

Appendix C

Conclusion.

For the foregoing reasons, the court holds that the Secretary issued the subpoena for a proper purpose authorized by congress, the information sought is relevant to that purpose and adequately described in the subpoena, and the Secretary followed statutory procedures in issuing the subpoena. *United States v. Comley*, 890 F.2d 539, 541 (1st Cir. 1989). The Secretary's Application for Order Enforcing an Administrative Subpoena (document no. 1) is granted. The Company's Motion to Vacate Citation (document no. 10) is denied. The Company's Motion for Reconsideration (document no. 23) is denied.

SO ORDERED.

s/ Steven J. McAuliffe
Steven J. McAuliffe
United States District Judge

August 4, 1995

cc: David L. Baskin, Esq.
Gretchen L. Witt, Esq.
Jeremy Ritzenberg, Esq.

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED MARCH 14, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 94-373-M

Robert B. Reich, Secretary of Labor, United States Department of Labor

v.

Sturm, Ruger & Co., Inc.

ORDER

Before the court for consideration are defendant's motion to vacate citation and defendant's motion to compel production of documents and to limit hearing of September 1, 1994.

In considering the motion to vacate citation, the court opines that if the Report and Recommendation dated March 13, 1995, is accepted by the presiding judge, the motion (document no. 10) shall be rendered moot.

In relation to the motion to compel production of documents and to limit hearing of September 1, 1994, the court views the assertions presented by the defendant as more appropriately addressed within the analytical purview of the Freedom of Information Act than within the ambit of the Occupational Safety and Health Act. Therefore, as the motion to compel (document no. 9), concerning production of documents, is premised on a separate and distinct violation or cause of action, it is denied without prejudice.

Appendix D

SO ORDERED.

s/ William H. Barry
William H. Barry, Jr.
United States Magistrate Judge

March 14, 1995

cc: David Baskin, Esq.
Gretchen Witt, Esq.
Jeremy Ritzenberg, Esq.

APPENDIX E — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW HAMPSHIRE DATED MARCH 13, 1995

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Civil No. 94-373-M

Robert B. Reich, Secretary of Labor, United States Department of Labor

v.

Sturm, Ruger & Co., Inc.

REPORT AND RECOMMENDATION

This is an action brought by the Secretary of Labor (Secretary) seeking to enforce an administrative subpoena issued in connection with an inspection of defendant's manufacturing plant located in Newport, New Hampshire, under the Occupational Safety and Health Act, 29 U.S.C. § 651, *et seq.*

Background

On November 1, 1992, the Concord, New Hampshire, Occupational Safety and Health Administration (OSHA) area director developed a Local Emphasis Program (LEP) for the inspection of industries that experience high incidences of multiple movement disorders (ergonomics) such as carpal tunnel syndrome (CTS) and tendinitis. In developing the program, on December 31, 1992, the area director obtained a computer printout from the New Hampshire Bureau of Worker's

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Compensation containing first reports of injury/illness worker's compensation cases. From this printout, the area director developed a list of employers having frequent cases of CTS and tendinitis injuries. Defendant had the third highest number of compensation claims coded as CTS and tendinitis.

By hand-delivered letter dated August 17, 1993, the area director advised the defendant of OSHA's general interest in reducing and/or eliminating ergonomic hazards resulting in cumulative trauma disorder (CTD) cases and New Hampshire's LEP seeking to investigate the significant increase of incidents of CTS and tendinitis reported by the Bureau of Worker's Compensation and why the defendant's plant was selected for inspection. On the same date, Compliance Safety and Health Officer Donald DeWees (DeWees), responding to a June 12, 1993, complaint regarding alleged air quality hazards at the defendant's plant, went to defendant's plant and began an inspection of both air quality and ergonomics.

DeWees returned to defendant's plant on November 12, 1993, to inspect the Checking and Polishing Departments, where high rates of CTS reportedly took place. During the course of this investigation, DeWees requested that certain information pertaining to CTD cases be sent to him at the OSHA office. He was told in a telephone conversation on December 20, 1993, that the information would not be released and was referred to defendant's attorney. On January 11, 1994, the subpoena in question was served on defendant's environmental engineer and security director but the information was not produced. On January 19, 1994, defendant's attorney voluntarily offered to produce the information sought, provided that the information would not serve as a basis for an enforcement action by OSHA. OSHA rejected the offer and brought suit to enforce the administrative subpoena.

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In opposition to enforcement of the administrative subpoena, the defendant now urges that it has the right to refuse to honor the administrative subpoena because:

1. OSHA's contested entry into defendant's plant pursuant to a local emphasis program of questionable legality makes the administrative subpoena invalid and unenforceable under the Fourth Amendment, and

2. OSHA has acted in bad faith by refusing to respond to defendant's Freedom of Information Act request to produce documents and defendant requests to produce the same documents in the instant case.

Discussion

The Occupational Safety and Health Act of 1970, 29 U.S.C. §§ 651-78 (the Act) was enacted "in response to an appalling record of death and disability in our industrial environment, and it was the clear intendment of Congress to meet the problem with broad and, hopefully, effective legislation." *Southern Ry. Co. v. Occupational Saf. & H. Review Comm.*, 539 F.2d 335, 338 (4th Cir.), *cert. denied*, 429 U.S. 999, 97 S.Ct. 525, 50 L.Ed.2d 609 (1976). Pursuant to the Act, the Secretary is authorized "to enact and enforce national occupational safety and health standards and, more broadly, to undertake investigations of company workplaces and practices '[i]n order to carry out the purposes of this chapter.' 29 U.S.C. § 657(a)." *Reich v. Muth*, 34 F.3d 240, 242-43 (4th Cir. 1994).

In the absence of any national safety standard, the general duty clause of the Act provides that the Secretary shall have the responsibility of insuring that:

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(a) Each employer —

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards. . . .

29 U.S.C. § 654(a)(1); *Donovan v. Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981). Recognized hazards are conditions or practices in the work place that are known by industry in general, or by employers in particular, to be hazardous. *Beaird-Poulan Div. of Emerson Electric Co.*, OSHRC Docket No. 12600 (1979). The term "recognized hazard" does not encompass conditions which only present *a possibility* of serious injury. *Pratt & Whitney Aircraft, Div. of United Technologies Corp. v. Secretary of Labor*, 649 F.2d 96 (2d Cir. 1981).

In performing the task of promoting and enforcing health and safety standards, section 657 of the Act empowers the Secretary "[i]n making his inspections and investigations under this chapter" and to "require the attendance and testimony of witnesses and the production of evidence under oath. . . ." 29 U.S.C. § 657(b). Correspondingly, "[t]he Secretary is authorized under § 657 (a) of the Act to review the safety and health records of employers, and [the Secretary] is authorized under § 657(b) to subpoena the records if they are not otherwise forthcoming." *Dole v. Trinity Industries, Inc.*, 904 F.2d 867, 872-73 (3d Cir. 1990).

It is this last authorization, the Secretary's ability to subpoena records, from which the present action predominantly arises.

Defendant maintains that the administrative subpoena

issued by OSHA should not be upheld principally because enforcing the subpoena violates Fourth Amendment rights. (Defendant's Memorandum Opposing Application for Order Enforcing an Administrative Subpoena, document no. 6.) In regard to this Fourth Amendment challenge, the defendant directs attention to *United States v. Comley*, 890 F.2d 539 (1st Cir. 1989). The court in *Comley* held that, to meet the requirements of the Fourth Amendment, administrative subpoenas must be "for a proper purpose authorized by Congress, the information sought [must be] relevant to that purpose and adequately described, and statutory procedures [must be] followed in the subpoena's issuance." *Comley*, 890 F.2d at 541.

In conjunction with *Comley*, defendant reiterates the maxim, offered by the United States Supreme Court, that "[t]he businessman, like the occupant of a residence, has a constitutional right to go about his business free from unreasonable official entries upon his private commercial property." *See v. City of Seattle*, 387 U.S. 541, 543 (1967). Defendant asserts that the subpoena issued by OSHA circumvents this maxim and, in so doing, violates the "probable cause" principles set forth in *Comley*.

Plaintiff counters defendant's assertion by maintaining that the "subpoena falls well within the scope of the enforcement criteria." (Plaintiff's Memorandum Supporting Application for Order Enforcing an Administrative Subpoena, attached to Application for Order Enforcing an Administrative Subpoena, at 5.) According to the plaintiff, "OSHA seeks the subpoenaed information in order to determine CTD trends and severity, CTD injury incidence rates, and jobs/tasks creating risks of CTD incidence." *Id.*

Appendix E

I. Issuance of Subpoena

The Supreme Court has held that an "inspection without a warrant or its equivalent pursuant to § 8(a) of OSHA violate[s] the Fourth Amendment." *Marshall v. Barlow's Inc.*, 436 U.S. 307, 311-25 (1978). The protections and requisites afforded by the Fourth Amendment likewise apply to administrative subpoenas. *See*, 387 U.S. at 543-44. Further, "[t]he Warrant Clause of the Fourth Amendment protects commercial buildings as well as private homes. To hold otherwise would belie the origin of that Amendment, and the American colonial experience." *Barlow's, Inc.*, 436 U.S. at 311.

In addition to mandating a warrant in inspection circumstances, *Barlow's, Inc.* "also outlined the probable cause showing necessary for the issuance of an administrative inspection warrant." *Donovan v. Wollaston Alloys, Inc.*, 695 F.2d 1, 5 (1st Cir. 1982). Succinctly, an issued warrant or subpoena may be sustained, on a probable cause challenge, only where there is "specific evidence of an existing violation [or] . . . a showing that 'reasonable legislative or administrative standards for conducting an . . . inspection are satisfied with respect to a particular [establishment].' " *Barlow's, Inc.*, 436 U.S. at 320 (footnote omitted) (quoting *Camara v. Municipal Court*, 387 U.S. 523, 538 (1967)). As enunciated in *Barlow's, Inc.*:

> The authority to make warrantless searches devolves almost unbridled discretion upon executive and administrative officers, particularly those in the field, as to when to search and whom to search. A warrant, by contrast, would provide assurances from a neutral officer that the inspection is

> reasonable under the Constitution, is authorized by statute, and is pursuant to an administrative plan containing specific neutral criteria. Also, a warrant would then and there advise the owner of the scope and objects of the search, beyond which limits the inspector is not expected to proceed. These are important functions for a warrant to perform, functions which underlie the Court's prior decisions that the Warrant Clause applies to inspections for compliance with regulatory statutes.

Barlow's, Inc., 436 U.S. at 323-24 (footnote omitted).

Against the *Barlow's, Inc.* backdrop, the following requirements for enforcement of an administrative subpoena must be met: (1) the inquiry must be within the authority of the agency, (2) the demand for production must not be too indefinite, and (3) the information sought must be reasonably relevant to the authorized inquiry. *United States v. Westinghouse Electric Corp.*, 638 F.2d 570, 574 (3d Cir. 1980); *United States v. Morton Salt Co.*, 338 U.S. 632, 652 (1950). With respect to the first and third factors noted above, ample consideration should be given to whether the subpoena seeks to enforce a violation of a safety or health standard issued by OSHA or a violation of the general duty clause. *See Reich v. Montana Sulphur & Chemical Co.*, 32 F.3d 440, 445-47 (9th Cir. 1994).

In the case at hand, OSHA has failed to comply with the above mentioned standards. Fundamentally, given the facts presented in this case, it is apparent that OSHA was not acting pursuant to any statutory authority when it issued a subpoena

and, therefore, lacked the probable cause necessary for obtaining the subpoena.

As defendant has pointed out, at the time OSHA sought certain documents from the defendant by use of a subpoena, OSHA had not promulgated any standards pertaining to ergonomics nor were any in place from congressional legislation. Heedful of the already complicated requirements associated with being in businesses, employers cannot be expected to adhere to policies or procedures not properly authorized. Irrefragably, allowing such unauthorized review or practices by government agencies would create " 'unbridled discretion' in the hands of inspection officers." *Wollaston Alloys Inc.*, 695 F.2d at 5. Further, absent any standards authorized by OSHA or the legislature, defendant had no obligation or responsibility to comply with plaintiff's request for documents. (29 C.F.R., Ch. XVII, Section 1903.1, provides that employers are only required to "comply with occupational safety and health standards *promulgated under the Act*. . . ." (Emphasis added.))

To recapitulate, with no statutory authority to review a particular issue, there likewise was no statutory authority to conduct investigations. It follows that, where the Act fails to establish a standard, OSHA has no authority to review the procedures and environment of a business by issuing a warrant or subpoena. Thus, the subpoena should not be enforced. *See Trinity Industries v. OSHRC*, 16 F.3d 1455, 1463 (6th Cir. 1994); *Donovan v. Sarasota Concrete Co.*, 9 O.S.H. Cas. (BNA) 1608, 1614 (Rev. Comm. 1981), *aff'd*, 693 F.2d 1061 (11th Cir. 1982) (when "the Secretary fails to meet the relaxed standard of administrative probable cause as articulated by the [Supreme] Court in *Barlow's*, the resulting inspection is invalid and [the Commission is] required to exclude the illegally-seized evidence").

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Even the grant of authority vested in OSHA by the general duty clause of the Act does not encompass or provide justification for issuing a subpoena and conducting an investigation into CTD and ergonomics. In *Pepperidge Farm, Inc.*, 1993 WL 132982 (OSHRC), the Administrative Law Judge held that the general duty clause of the Act does not empower OSHA to review repetitive motion injuries because of the lack of viable means for abating the hazards inherent in the job function. Thus, as OSHA appears to have no authority under the general duty clause of the Act for conducting searches pertaining to repetitive motion injuries, there is further support for the conclusion that the subpoena requesting ergonomic-related documentation should not be enforced.

As a brief but relevant aside, plaintiff points to a few enactments and cases which purportedly discuss and allow OSHA authority to conduct searches and subpoena documents. Nevertheless, a cursory scan of these enactments and cases indicates the case at hand is easily distinguishable.

For instance, plaintiff offers that pursuant to 29 C.F.R., Ch. XVII, §§ 1904.2 and 1904.4, some records which are requested within the subpoena are required by law to be maintained by the defendant. By refusing to provide certain records, namely the 1993 OSHA 200 logs and the first report of injury document, plaintiff asserts that the defendant is in direct violation of §§ 1904.2, 1904.4, *et seq.*

Even though plaintiff is correct that §§ 1904.2 and 1904.4 require employers to maintain certain documents and forms, plaintiff is incorrect in inferring that employers are required, merely upon request, without more, to submit the forms for OSHA review. Rather, courts have consistently "concluded that

employers . . . have a privacy interest in the information contained in their Form 200's" and other documents required to be maintained. *See Reich v. National Engineering & Contracting Co.*, 13 F.3d 93, 98 (4th Cir. 1993); *McLaughlin v. Kings Island*, 849 F.2d 990, 995 (6th Cir. 1988) ("employers have a recognizable privacy interest in [their Form 200's], even though the employer is required by law to keep them"); *Brock v. Emerson Elec. Co. Elec. & Space Div.*, 834 F.2d 994, 996 (11th Cir. 1987) ("We find no reason to conclude that the privacy interest which normally attaches to commercial information does not attach [to the information on Form 200's]."). Further, recognizing the privacy interest in such forms, the Supreme Court has rejected the contention that OSHA may inspect documents, albeit required by law to be maintained, without proper authority. *Barlow's, Inc.*, 436 U.S. at 324 n.22 ("It is the Secretary's position, which we reject, that an inspection of documents of this scope may be effected without a warrant.")

Iterating, although §§ 1904.2, *et seq.*, certainly do enunciate requirements which must be followed by businesses, the sections do not enable OSHA to circumvent Fourth Amendment rights and conduct discretionary or "willy-nilly" searches. Thus, in following and considering plaintiff's argument concerning the underlying omnipotence of §§ 1904.2, *et seq.*, the court ends precisely where it began. A showing of probable cause and proper authority must be made before OSHA will be entitled to review documents required to be maintained under § 1904.2, *et seq.*

In further emphasizing the authority vested in OSHA, plaintiff draws attention to a myriad of case law purporting to establish or explain the permissible reach of OSHA's authority to search business premises and subpoena documents.

Specifically, under cases such as Matter of *Kelly-Springfield Tire Co.*, 13 F.3d 1160 (7th Cir. 1994) and *Matter of Samsonite Corp.*, 756 F. Supp. 498 (D. Colo. 1991), plaintiff contends that courts have held that OSHA is empowered to issue subpoenas and review documents pertaining to repetitive trauma injuries.

Here again, the cases cited by the plaintiff are distinguishable from the case at hand.

As a pertinent consideration, 29 U.S.C. § 657(f)(1) provides that:

> Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, *may request an inspection* by giving notice to the Secretary or his authorized representative of such violation or danger. . . . *If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection* in accordance with the provisions of this section. . . .

(Emphasis added.)

Paraphrasing 29 U.S.C § 657(f), "OSHA is authorized . . . to conduct investigations in response to employee complaints. . . ." *Montana Sulphur & Chemical Co.*, 32 F.3d at 444. "[A]uthorized complaint-based investigations are those which relate to the 'violation or danger' alleged." *Id.* at 447.

Fundamental to this form of investigation is the existence of a complaint triggering OSHA authority. *Trinity Industries,* 16 F.3d at 1460.

Recognizing the significance of a complaint to an authorized complaint-based investigation, absent any indication that an injury has occurred or absent any complaint reported by an employee or representative, § 657 should not be construed as empowering OSHA to conduct broad and exploratory investigations. *See Barlow's, Inc.*, 436 U.S. at 315 ("That an employee is free to report, and the Government is free to use, any evidence of noncompliance with OSHA that the employee observes furnishes no justification for federal agents to enter a place of business from which the public is restricted and to conduct their own warrantless search." (footnote omitted)); *Trinity Industries, Inc.*, 904 F.2d at 868 ("Under section 8(f) of the Act, 29 U.S.C. § 657(f), such a complaint can, and in this case did, trigger an inspection of the conditions described." (footnote omitted)); *National Engineering & Contracting Co.*, 13 F.3d at 99 ("OSHA was plainly acting within its authority when, in response to two falls by employees at one of the Companies' worksites, it inquired into whether 'the overall fall protection program' used by the Companies at all of their worksites was adequate" (footnote omitted)).

Considering the above-mentioned framework, the important and distinguishing feature between the case at hand and the cases relied upon by the plaintiff is that, here, OSHA was not conducting its investigation of ergonomics pursuant to complaint-based authority. Rather, as plaintiff itself admits, prior to the inspection, OSHA received information from the State of New Hampshire which prompted it to develop an inspection roster listing employees with *potential* adverse

conditions of employment. Thus, as the major impetus behind plaintiff's search of defendant's plant was a report compiled by the New Hampshire Bureau of Worker's Compensation, OSHA's selection of defendant's plant for review does not appear to be based on neutral criteria. *See Marshall v. Weyerhaeuser Co.*, 456 F. Supp. 474, 483 (D.N.J. 1978); *Barlow's, Inc.*, 436 U.S. at 307; *Sarasota Concrete Co.*, 693 F.2d at 1068 ("administrative and legislative guidelines . . . ensure that [employers selected for inspection pursuant to neutral administrative plans have not been] chosen simply for the purpose of harassment").

Analogously, although the inspection of defendant's facility pertaining to air quality may have been pursuant to legal and valid authority, that authority did not transcend into an ability to conduct an investigation into unrelated matters. Pursuant to 29 C.F.R., Ch. XVII, Section 1903.3, officers of the Department of Labor are authorized to "review records required by the Act and regulations published in this chapter, and other records which *are directly related to the purpose of the inspection.*" (Emphasis added.) Courts have required that the scope or degree of a plant inspection, in response to an employee complaint, shall be limited to the conditions described within the complaint. *Marshall v. North American Car Co.*, 626 F.2d 320 (3d Cir. 1980); *West Point-Pepperell Inc. v. Donovan*, 689 F.2d 950 (11th Cir. 1982). Thus, where OSHA was authorized, subject to a complaint, to conduct a search or investigation of defendant's plant concerning air ambiance, plaintiff was not allowed to broaden or ripen that search into an investigation of unrelated ergonomic matters. *Sarasota Concrete Co.*, 693 F.2d at 1068 ("a complaint inspection must bear an appropriate relationship to the violation alleged in the complaint"). Performing such an unrelated "wall-to-wall" investigation would constitute an impermissible "bootstrapping" or "fishing

expedition." *See Montana Sulphur & Chemical Co.*, 32 F.3d at 446.

II. *Improper Purpose*

Defendant contends that "OSHA has abused the subpoena process in the circumstances of this case by acting for an improper purpose. . . ." (Defendant's Memorandum opposing Application for Order Enforcing an Administrative Subpoena, document no. 6, at 7-8.) Specifically, defendant asserts that OSHA misled defendant about particular purposes associated with obtaining access to the plant. Additionally, defendant maintains that at the same time plaintiff sought information from defendant, defendant requested plaintiff to provide information concerning certain programs and the method used to select defendant for participation in the programs. Defendant maintains that plaintiff has failed to provide such information.

As a succinct response to the concerns raised by the defendant, the facts and issues propounded by the defendant appear to closely track the probable cause issues previously addressed. This being the case, there appears to be little utility in rehashing prior findings and conclusions.

Conclusion

The legal principles deriving from the Fourth Amendment are apodictic that government agencies will not be allowed to conduct fishing expeditions within private businesses under the guise of a search similar to that in *Barlow's, Inc.*, or seizure by way of administrative subpoena, in the hope that some useful findings will turn up. Such conduct "flies in the face of the spirit, if not the letter," of the right against unlawful searches and

seizures. *Freese v. F.D.I.C.*, 837 F. Supp. 22, 25 (D.N.H.1993); *Matter of Kelly-Springfield Tire Co.*, 13 F.3d at 1166 ("An employer has a right to have his worksite free of interruptions and intrusions. . . .").

With the above in mind, because OSHA has failed to demonstrate how enforcement of its policies are related to (1) a violation of a safety and health standard issued by OSHA or (2) a violation of Section 654(a)(1) of the Act, OSHA's issuance of a subpoena on the defendant should be viewed as being without authority or legal support. It is, therefore, recommended that plaintiff's application for order enforcing an administrative subpoena (document no. 1) be denied.

Any objections to this report and recommendation must be filed within ten days of receipt of this notice. Failure to file objections within the specified time waives the right to appeal. *See United States v. Valencia-Copete*, 792 F.2d 4, 6 (1st Cir. 1986).

s/ William H. Barry
William H. Barry, Jr.
United States Magistrate Judge

March 13, 1995

cc: David Baskin, Esq.
Gretchen Witt, Esq.
Jeremy Ritzenberg, Esq.

APPENDIX F — RELEVANT REGULATIONS AND STATUTES

29 C.F.R. § 1903.4

§ 1903.4 Objection to inspection

(a) Upon a refusal to permit the Compliance Safety and Health Officer, in exercise of his official duties, to enter without delay and at reasonable times any place of employment or any place therein, to inspect, to review records, or to question any employer, owner, operator, agent, or employee, in accordance with § 1903.3 or to permit a representative of employees to accompany the Compliance Safety and Health Officer during the physical inspection of any workplace in accordance with § 1983.8, the Safety and Health Officer shall terminate the inspection or confine the inspection to other areas, conditions, structures, machines, apparatus, devices, equipment, materials, records, or interviews concerning which no objection is raised. The Compliance Safety and Health Officer shall endeavor to ascertain the reason for such refusal, and shall immediately report the refusal and the reason therefor to the Area Director. The Area Director shall consult with the Regional Solicitor, who shall take appropriate action, including compulsory process, if necessary.

(b) Compulsory process shall be sought in advance of an attempted inspection or investigation if, in the judgment of the Area Director and the Regional Solicitor, circumstances exist which make such preinspection process desirable or necessary. Some examples of circumstances in which it may be desirable or necessary to seek compulsory process in advance of an attempt to inspect or investigate include (but are not limited to):

(1) When the employer's past practice either implicitly or

explicitly puts the Secretary on notice that a warrantless inspection will not be allowed;

(2) When an inspection is scheduled far from the local office and procuring a warrant prior to leaving to conduct the inspection would avoid, in case of refusal of entry, the expenditure of significant time and resources to return to the office, obtain a warrant and return to the worksite;

(3) When an inspection includes the use of special equipment or when the presence of an expert or experts is needed in order to properly conduct the inspection, and procuring a warrant prior to an attempt to inspect would alleviate the difficulties or costs encountered in coordinating the availability of such equipment or expert.

(c) With the approval of the Regional Administrator and the Regional Solicitor, compulsory process may also be obtained by the Area Director or his designee.

(d) For purposes of this section, the term compulsory process shall mean the institution of any appropriate action, including *ex parte* application for an inspection warrant or its equivalent. *Ex parte* inspection warrants shall be the preferred form of compulsory process in all circumstances where compulsory process is relied upon to seek entry to a workplace under this section.

29 C.F.R. § 1904.7

§ 1904.7 Access to records.

(a) Each employer shall provide, upon request, records

provided for in §§ 1904.2, 1904.4, and 1904.5, for inspection and copying by any representative of the Secretary of Labor for the purpose of carrying out the provisions of the act, and by representatives of the Secretary of Health, Education, and Welfare during any investigation under section 20(b) of the act, or by any representative of a State accorded jurisdiction for occupational safety and health inspections or for statistical compilation under sections 18 and 24 of the act.

(b)(1) The log and summary of all recordable occupational injuries and illnesses (OSHA No. 200) (the log) provided for in § 1904.2 shall, upon request, be made available by the employer to any employee, former employee, and to their representatives for examination and copying in a reasonable manner and at reasonable times. The employee, former employee, and their representatives shall have access to the log for any establishment in which the employee is or has been employed.

(2) Nothing in this section shall be deemed to preclude employees and employee representatives from collectively bargaining to obtain access to information relating to occupational injuries and illnesses in addition to the information made available under this section.

(3) Access to the log provided under this section shall pertain to all logs retained under the requirements of § 1904.6.

Appendix F

PUBLIC LAW 104-99

Public Law 104-99
104th Congress
H.R. 2880

An Act

Making appropriations for fiscal year 1996 to make a downpayment toward a balanced budget, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That the following sums are hereby appropriated, out of any money in the Treasury not otherwise appropriated and out of applicable corporate or other revenues, receipts, and funds, for the several departments, agencies, corporations, and other organizational units of Government for the fiscal year 1996, and for other purposes, namely:

* * *

(c) Whenever an Act listed in this section has been passed by only the House or only the Senate as of the date of enactment of this Act, the pertinent project or activity shall be continued under the appropriation, fund, or authority granted by the one House at a rate for operations not exceeding the current rate or the rate permitted by the action of the one House, whichever is lower, and under the authority ad conditions provided in the applicable appropriations Act for the fiscal year 1995: *Provided,* That where an item is funded in the applicable appropriations Act for the fiscal year 1995 and not included in the version passed by the one

House as of the date of enactment of this Act, the pertinent project or activity shall not be continued except as provided for in section 111 under the appropriation, fund, or authority granted by the applicable appropriations Act for the fiscal year 1995 and under the authority and conditions provided in the applicable appropriations Act for the fiscal year 1995.

* * *

PUBLIC LAW 104-19

EMERGENCY SUPPLEMENTAL APPROP.

GENERAL PROVISIONS

* * *

SEC. 602. None of the funds made available in any appropriations Act for fiscal year 1995 may be used by the Occupational Safety and Health Administration to promulgate or issue any proposed or final standard or guideline regarding ergonomic protection. Nothing in this section shall be construed to limit the Occupational Safety and Health Administration from conducting any peer-reviewed risk assessment activity regarding ergonomics, including conducting peer reviews of the scientific basis for establishing any standard or guideline, direct or contracted research, or other activity necessary to fully establish the scientific basis for promulgating any standard or guideline on ergonomic protection.

Appendix F

29 U.S.C. § 654

§ 654. Duties of employers and employees

(a) Each employer —

(1) shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees;

(2) shall comply with occupational safety and health standards promulgated under this chapter.

* * *

29 U.S.C. § 655

§ 655. Standards

(a) Promulgation by Secretary of national consensus standards and established Federal standards; time for promulgation; conflicting standards

Without regard to chapter 5 of Title 5 or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this chapter and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict

among any such standard, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

(b) Procedure for promulgation, modification, or revocation of standards

The Secretary may by rule promulgate, modify, or revoke any occupational safety or health standard in the following manner:

(1) Whenever the Secretary, upon the basis of information submitted to him in writing by an interested person, a representative of any organization of employers or employees, a nationally recognized standards-producing organization, the Secretary of Health and Human Services, the National Institute for Occupational Safety and Health, or a State or political subdivision, or on the basis of information developed by the Secretary or otherwise available to him, determines that a rule should be promulgated in order to serve the objectives of this chapter, the Secretary may request the recommendations of an advisory committee appointed under section 656 of this title. The Secretary shall provide such an advisory committee with any proposals of his own or of the Secretary of Health and Human Services, together with all pertinent factual information developed by the Secretary or the Secretary of Health and Human Services, or otherwise available, including the results of research, demonstrations, and experiments. An advisory committee shall submit to the Secretary its recommendations regarding the rule to be promulgated within ninety days from the date of its appointment or within such longer or

shorter period as may be prescribed by the Secretary, but in no event for a period which is longer than two hundred and seventy days.

(2) The Secretary shall publish a proposed rule promulgating, modifying, or revoking an occupational safety or health standard in the Federal Register and shall afford interested persons a period of thirty days after publication to submit written data or comments. Where an advisory committee is appointed and the Secretary determines that a rule should be issued, he shall publish the proposed rule within sixty days after the submission of the advisory committee's recommendations or the expiration of the period prescribed by the Secretary for such submission.

(3) On or before the last day of the period provided for the submission of written data or comments under paragraph (2), any interested person may file with the Secretary written objections to the proposed rule, stating the grounds therefor and requesting a public hearing on such objections. Within thirty days after the last day for filing such objections, the Secretary shall publish in the Federal Register a notice specifying the occupational safety or health standard to which objections have been filed and a hearing requested, and specifying a time and place for such hearing.

(4) Within sixty days after the expiration of the period provided for the submission of written data or comments under paragraph (2), or within sixty days after the completion of any hearing held under paragraph (3), the Secretary shall issue a rule promulgating, modifying, or

revoking an occupational safety or health standard or make a determination that a rule should not be issued. Such a rule may contain a provision delaying its effective date for such period (not in excess of ninety days) as the Secretary determines may be necessary to insure that affected employers and employees will be informed of the existence of the standard and its terms and that employers affected are given an opportunity to familiarize themselves and their employees with the existence of the requirements of the standard.

* * *

(7) Any standard promulgated under this subsection shall prescribe the use of labels or other appropriate forms of warning as are necessary to insure that employees are apprised of all hazards to which they are exposed, relevant symptoms and appropriate emergency treatment, and proper conditions and precautions of safe use or exposure. Where appropriate, such standard shall also prescribe suitable protective equipment and control or technological procedures to be used in connection with such hazards and shall provide for monitoring or measuring employee exposure at such locations and intervals, and in such manner as may be necessary for the protection of employees. In addition, where appropriate, any such standard shall prescribe the type and frequency of medical examinations or other tests which shall be made available, by the employer or at his cost, to employees exposed to such hazards in order to most effectively determine whether the health of such employees is adversely affected by such exposure. In the event such medical examinations are in the nature of research, as determined by the Secretary of Health

and Human Services, such examinations may be furnished at the expense of the Secretary of Health and Human Services. The results of such examinations or tests shall be furnished only to the Secretary or the Secretary of Health and Human Services, and, at the request of the employee, to his physician. The Secretary, in consultation with the Secretary of Health and Human Services, may by rule promulgated pursuant to section 553 of Title 5, make appropriate modifications in the foregoing requirements relating to the use of labels or other forms of warning, monitoring or measuring, and medical examinations, as may be warranted by experience, information, or medical or technological developments acquired subsequent to the promulgation of the relevant standard.

(8) Whenever a rule promulgated by the Secretary differs substantially from an existing national consensus standard, the Secretary shall, at the same time, publish in the Federal Register a statement of the reasons why the rule as adopted will better effectuate the purposes of this chapter than the national consensus standard.

(c) Emergency temporary standards

(1) The Secretary shall provide, without regard to the requirements of chapter 5 of Title 5, for an emergency temporary standard to take immediate effect upon publication in the Federal Register if he determines (A) that employees are exposed to grave danger from exposure to substances or agents determined to be toxic or physically harmful or from new hazards, and (B) that such emergency standard is necessary to protect employees from such danger.

(2) Such standard shall be effective until superseded by a standard promulgated in accordance with the procedures prescribed in paragraph (3) of this subsection.

(3) Upon publication of such standard in the Federal Register the Secretary shall commence a proceeding in accordance with subsection (b) of this section, and the standard as published shall also serve as a proposed rule for the proceeding. The Secretary shall promulgate a standard under this paragraph no later than six months after publication of the emergency standard as provided in paragraph (2) of this subsection.

* * *

29 U.S.C. § 657

§ 657. Inspections, investigations, and recordkeeping

(a) Authority of Secretary to enter, inspect, and investigate places of employment; time and manner

In order to carry out the purposes of this chapter, the Secretary, upon presenting appropriate credentials to the owner, operator, or agent in charge, is authorized —

(1) to enter without delay and at reasonable times any factory, plan, establishment, construction site, or other area, workplace or environment where work is performed by an employee of an employer; and

(2) to inspect and investigate during regular working hours and at other reasonable times, and within reasonable

limits and in a reasonable manner, any such place of employment and all pertinent conditions, structures, machines, apparatus devices, equipment, and materials therein, and to question privately any such employer, owner, operator, agent or employee.

(b) Attendance and testimony of witnesses and production of evidence; enforcement of subpoena

In making his inspections and investigations under this chapter the Secretary may require the attendance and testimony of witnesses and the production of evidence under oath. Witnesses shall be paid the same fees and mileage that are paid witnesses in the courts of the United States. In case of a contumacy, failure, or refusal of any person to obey such an order, any district court of the United States or the United States courts of any territory or possession, within the jurisdiction of which such person is found, or resides or transacts business, upon the application by the Secretary, shall have jurisdiction to issue to such person an order requiring such person to appear to produce evidence if, as, and when so ordered, and to give testimony relating to the matter under investigation or in question, and any failure to obey such order of the court may be punished by said court as a contempt thereof.

(c) Maintenance, preservation, and availability of records; issuance of regulations; scope of records; periodic inspections by employer; posting of notices by employer; notification of employee of corrective action

(1) Each employer shall make, keep and preserve, and make available to the Secretary or the Secretary of Health and Human Services, such records regarding his activities relating to

this chapter as the Secretary, in cooperation with the Secretary of Health and Human Services, may prescribe by regulation as necessary or appropriate for the enforcement of this chapter or for developing information regarding the causes and prevention of occupational accidents and illnesses. In order to carry out the provisions of this paragraph such regulations may include provisions requiring employers to conduct periodic inspections. The Secretary shall also issue regulations requiring that employers, through posting of notices or other appropriate means, keep their employees informed of their protections and obligations under this chapter, including the provisions of applicable standards.

(2) The Secretary, in cooperation with the Secretary of Health and Human Services, shall prescribe regulations requiring employees to maintain accurate records of and to make periodic reports on, work-related deaths, injuries and illnesses other than minor injuries requiring only first aid treatment and which do not involve medical treatment, loss of consciousness, restriction of work or motion, or transfer to another job.

(3) The Secretary, in cooperation with the Secretary of Health and Human Services, shall issue regulations requiring employers to maintain accurate records of employee exposures to potentially toxic materials or harmful physical agents which are required to be monitored or measured under section 655 of this title. Such regulations shall provide employees or their representatives with an opportunity to observe such monitoring or measuring, and to have access to the records thereof. Such regulations shall also make appropriate provision for each employee or former employee to have access to such records as will indicate his own exposure to toxic materials or harmful physical agents. Each employer shall promptly notify any

employee who has been or is being exposed to toxic materials or harmful physical agents in concentrations or at levels which exceed those prescribed by an applicable occupational safety and health standard promulgated under section 655 of this title, and shall inform any employee who is being thus exposed of the corrective action being taken.

* * *

(f) Request for inspection by employees or representative of employees; grounds; procedure; determination of request; notification of Secretary or representative prior to or during an inspection of violations; procedure for review of refusal by representative of Secretary to issue citation for alleged violations

(1) Any employees or representative of employees who believe that a violation of a safety or health standard exists that threatens physical harm, or that an imminent danger exists, may request an inspection by giving notice to the Secretary or his authorized representative of such violation or danger. Any such notice shall be reduced to writing, shall set forth with reasonable particularity the grounds for the notice, and shall be signed by the employees or representative of employees, and a copy shall be provided for employer or his agent no later than at the time of inspection, except that, upon the request of the person giving such notice, his name and the names of individual employees referred to therein shall not appear in such copy or on any record published, released, or made available pursuant to subsection (g) of this section. If upon receipt of such notification the Secretary determines there are reasonable grounds to believe that such violation or danger exists, he shall make a special inspection in accordance with the provisions of this section as soon as

practicable, to determine if such violation or danger exists. If the Secretary determines there are no reasonable grounds to believe that a violation or danger exists he shall notify the employees or representative of the employees in writing of such determination.

(2) Prior to or during any inspection of a workplace, any employees or representative of employees employed in such workplace may notify the Secretary or any representative of the Secretary responsible for conducting the inspection, in writing of any violation of this chapter which they have reason to believe exists in such workplace. The Secretary shall, by regulation, establish procedures for informal review of any refusal by a representative of the Secretary to issue a citation with respect to any such alleged violation and shall furnish the employees or representative of employees requesting such review a written statement of the reasons for the Secretary's final disposition of the case.

(g) Compilation, analysis, and publication of reports and information; rules and regulations

(1) The Secretary and Secretary of Health and Human Services are authorized to compile, analyze, and publish, either in summary or detailed form, all reports or information obtained under this section.

(2) The Secretary and the Secretary of Health and Human Services shall each prescribe such rules and regulations as he may deem necessary to carry out their responsibilities under this chapter, including rules and regulations dealing with the inspection of an employer's establishment.

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(Pub. L. 91-596, § 8, Dec. 29, 1970, 84 Stat. 1598; Pub. L. 96-88, Title V, § 509(b), Oct. 17, 1979, 93 Stat. 695.)

* * *

5 U.S.C.S. § 551

§ 551. Definitions

For the purpose of this subchapter [5 USCS §§ 551 et seq.] —

(1) "agency" means each authority of the Government of the United States, whether or not it is within or subject to review by another agency, but does not include —

(A) the Congress;

(B) the courts of the United States;

(C) the governments of the territories or possessions of the United States;

(D) the government of the District of Columbia;

or except as to the requirements of section 552 of this title —

(E) agencies composed of representatives of the parties or of representatives of organizations of the parties to the disputes determined by them;

(F) courts martial and military commissions;

(G) military authority exercised in the field in time of war or in occupied territory; or

(H) functions conferred by sections 1738, 1739, 1743, and 1744 of title 12; chapter 2 of title 41 [41 USCS §§ 101 et seq.]; or sections 1622, 1884, 1891-1902, and former section 1641(b)(2), of title 50, appendix;

(2) "person" includes an individual, partnership, corporation, association, or public or private organization other than an agency;

(3) "party" includes a person or agency named or admitted as a party, or properly seeking and entitled as of right to be admitted as a party, in an agency proceeding, and a person or agency admitted by an agency as a party for limited purposes;

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

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(6) "order" means the whole or a part of a final disposition, whether affirmative, negative, injunctive, or declaratory in form, of an agency in a matter other than rule making but including licensing;

(7) "adjudication" means agency process for the formulation of an order;

* * *

(10) "sanction" includes the whole or a part of an agency —

(A) prohibition, requirement, limitation, or other condition affecting the freedom of a person;

(B) withholding of relief;

(C) imposition of penalty or fine;

(D) destruction, taking, seizure, or withholding of property;

(E) assessment of damages, reimbursement, restitution, compensation, costs, charges, or fees;

(F) requirement, revocation, or suspension of a license; or

(G) taking other compulsory or restrictive action;

(11) "relief" includes the whole or a part of an agency —

(A) grant of money, assistance, license, authority, exemption, exception, privilege, or remedy;

(B) recognition of a claim, right, immunity, privilege, exemption, or exception; or

(C) taking of other action on the application or petition of, and beneficial to, a person;

(12) "agency proceeding" means an agency process as defined by paragraphs (5), (7), and (9) of this section;

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

* * *

5 U.S.C.S. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved —

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named

and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include —

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply —

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except —

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 USCS § 555

§ 555. Ancillary matters

(a) This section applies, according to the provisions thereof, except as otherwise provided by this subchapter [5 USCS §§ 551 et seq.].

* * *

(c) Process, requirement of a report, inspection, or other investigative act or demand may not be issued, made, or enforced except as authorized by law. A person compelled to submit data or evidence is entitled to retain or, on payment of lawfully prescribed costs, procure a copy or transcript thereof, except that in a nonpublic investigatory proceeding the witness may for good cause be limited to inspection of the official transcript of his testimony.

(d) Agency subpenas authorized by law shall be issued to a party on request and, when required by rules of procedure, on a statement or showing of general relevance and reasonable scope of the evidence sought. On contest, the court shall sustain the subpena or similar process or demand to the extent that it is found to be in accordance with law. In a proceeding for enforcement, the court shall issue an order requiring the appearance of the witness or the production of the evidence or data within a reasonable time under penalty of punishment for contempt in case of contumacious failure to comply.

* * *

APPENDIX G — FEDERAL REGISTER VOLUME 57 NO. 149 DATED AUGUST 3, 1992

DEPARTMENT OF LABOR

Occupational Safety and Health Administration

29 CFR Part 1910

[Docket No. S-777]

RIN 1218-AB36

Ergonomic Safety and Health Management

AGENCY: Occupational Safety and Health Administration.

ACTION: Advance Notice of Proposed Rulemaking Requests for comments and information.

SUMMARY: In recent years there has been a significant increase in the reported cases of ergonomic disorders in the workplace. The Bureau of Labor Statistics has reported that the number of "disorders associated with repeated trauma" has more than tripled since 1984. In response to this as well other available information, the Occupational Safety and Health Administration [OSHA] is announcing the initiation of rulemaking under section 6(b) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 655, and requesting information relevant to preventing, eliminating, and reducing occupational exposure to ergonomic hazards. OSHA is considering the development of a safety and health management standard that would address ergonomic hazards in the workplace for general industry or specific industries or subsectors within general industry, as well as for maritime, construction, and agriculture industries.

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This Advance Notice of Proposed Rulemaking (ANPR) briefly summarizes the ongoing activities in this area: describes information available to OSHA concerning ergonomic hazards, ergonomic disorders, and risk estimates; and requests information for consideration in the development of a standard. Interested parties are invited to submit data, comments, and other pertinent information regarding OSHA's development of a proposed standard addressing ergonomic hazards.

Responses to questions are requested regarding the need for an ergonomic safety and health management standard, as well as the content, extent and scope of the suggested components of such a standard.

As part of the initiation of rulemaking, OSHA is also considering the need to hold several informal public meetings in various locations throughout the United States to permit oral presentations of additional comments, information and data concerning the developing of a regulation addressing ergonomic hazards in the workplace.

* * *

SUPPLEMENTARY INFORMATION:

1. Background

A substantial number of American workers may be at risk of developing some type of ergonomic disorder due to their exposure to ergonomic hazards in the workplace. In recent years there has been a significant increase in number of occupational ergonomic disorders reported, including cumulative trauma disorders (CTDs) and other work-related disorders due to

ergonomic hazards. Ergonomic disorders, ergonomic hazards and ergonomic stressors are defined, for the purposes of this ANPR and discussed further in Appendix A. In summary, OSHA is defining ergonomic disorders as disorders of the musculoskeletal and nervous systems occurring in either the upper or lower extremities, including backs. These may be caused or aggravated by repetitive motions, forceful exertions, vibration, sustained or awkward positioning or mechanical compression of the hand, wrist, arm, back, neck, shoulder, and leg over extended periods or from other ergonomic stressors. For the purpose of this ANPR ergonomic disorders include, among others, carpal tunnel syndrome, various tendon disorders, and lower back injuries.

Some of this increase in the number of reported cases of ergonomic disorders may be due to increased awareness by industry, labor, and government that ergonomic disorders have a connection to the workplace. Most ergonomic hazards and related disorders, however, appear to be due to changes in production processes and technologies, resulting in more specialized tasks with increased repetitions and higher assembly line speeds. In many cases these changes have not concomitantly included integration of ergonomic technologies. Other major factors contributing to ergonomic disorders are incentive or piecework systems and voluntary overtime work. These systems expose employees to an increase in the duration of repetitive motion as well as to an increase in other ergonomic stressors which may be present.

* * *

The increasing number of ergonomic disorders affecting employees in a wide variety of industries and the significant

costs of these disorders to employees, employers, and society suggest that a regulation to prevent, eliminate, and reduce ergonomic hazards in the workplace may be necessary. Therefore, OSHA is considering the development of an ergonomic safety and health management standard that would cover general, maritime, construction, and agriculture industries. OSHA is also considering whether this standard would need to cover not only processes, machines, and work methods that are common across industry, such as computer keyboards, but also those that are unique to particular industries, such as sewing machines in the garment industry.

If necessary, an ergonomics standard might include general components similar to those contained in the OSHA "Safety and Health Program Management Guidelines," published January 26, 1989 (Ex. 2-12). These components are 1) worksite analysis (which includes record assessment), 2) hazard prevention and control, 3) medical management, and 4) training and education. These components are recommendations by OSHA to all employers as a foundation for their safety and health programs and as a framework for their ergonomics programs. These components are defined and discussed further in Appendix A.

II. Ongoing Activities on Ergonomic Hazards in the Workplace

Although OSHA currently has no regulation to address ergonomic hazards, there are a number of actions OSHA has taken with regard to ergonomic hazards within the past few years.

First, the Safety and Health Program Management Guidelines discussed above have been applied to certain

ergonomic hazards. In November 1988, OSHA received a petition from an employer in the meat packing industry requesting that OSHA develop a standard concerning ergonomic issues. In response to that petition, in August 1990, OSHA issued the Ergonomics Program Management Guidelines for Meatpacking Plants (Ex. 2-13) which utilized the four program management components. The guidelines were based on the best available scientific evidence, advice from NIOSH, medical literature, and OSHA's experience in enforcement.

Second, at the time OSHA issued the meatpacking guidelines, the Agency also announced its intention to institute a national ergonomics special emphasis program for the red meat industry to foster better working conditions in that industry. Under the special emphasis program the guidelines were sent to each red meat plant in the United States and small employers were able to request training and other technical assistance from OSHA.

Along with the distribution of the guidelines, citations for ergonomics-related hazards have been issued to employers in the red meat industry. Under the authority of section 5(a)(1) of the Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 654 (a)(1), which states that employers have a general duty to furnish each employee with employment and a place of employment which are free from "recognized hazards," regardless of whether such hazards are regulated by specific federal standards. Although recognition of ergonomic hazards and presence of ergonomic disorders have not been confined to the meatpacking industry, the high incidence and severity of CTDs and other ergonomically related disorders in this industry indicated that an effective comprehensive program should be implemented by employers in this industry to protect workers from these hazards.

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Third, OSHA has also used its authority under section 5(a)(1) to pursue various enforcement actions in other industries addressing the presence of ergonomic hazards in the workplace. Some of these actions have resulted in corporate-wide agreements in the poultry processing and auto manufacturing industries to implement comprehensive ergonomic programs utilizing the program management components in the meatpacking guidelines. Comprehensive ergonomics programs also are being implemented in several apparel plants as a result of enforcement actions.

Fourth, the OSHA Training, Institute in Des Plaines, IL. is offering a course on ergonomic hazards in the meatpacking industry for federal and state enforcement staff as well as for state consultation staff. In addition, in August 1991, this course was presented in Washington, D.C. for meatpacking industry representatives.

Fifth, in order to give guidance to other industries, OSHA issued two publications in 1991 addressing ergonomic hazards. "Ergonomics: The Study of Work" (Ex. 2-14) and "Working Safely with Video Display Terminals" (Ex. 2-15).

Ergonomic hazards are also being addressed by others. For example, the American National Standards Institute has established a committee ANSI Z365, with the National Safety Council as the secretariat to develop a consensus standard on the control of cumulative trauma disorders. California OSHA is developing a proposed state ergonomics standard.

III. Petition for Emergency Temporary Standard

On July 31, 1991, the United Food and Commercial Workers

Union (UCFW), along with the AFL-CIO and 29 other labor organizations, petitioned OSHA to take immediate action to reduce the risk to employees from exposure to ergonomic hazards (Ex. 2-16). They requested that OSHA issue an emergency temporary standard (ETS) on "Ergonomic Hazards to Protect Workers from Work-Related Musculoskeletal Disorders (Cumulative Trauma Disorders)" under section 6(c) of the Act. The petitioners also requested that within six months of the issuance of an emergency temporary standard OSHA promulgate a permanent standard to protect workers from cumulative trauma disorders in both general industry and construction.

On April 17, 1992, OSHA decided not to issue an ETS on ergonomic hazards (Ex. 2-28). OSHA agreed with the petitioners that available information, including the ETS petition and supporting documents, supported initiation of Section 6(b)(5) rulemaking to address ergonomic hazards. However, OSHA also concluded that based on the statutory constraints and legal requirements governing issuance of an ETS, there was not sufficient basis for issuance of an ETS.

IV. Rulemaking Process

At the time OSHA issued the Ergonomic Program Management Guidelines for Meatpacking Plants, the Agency also indicated its intention to begin the rulemaking process by asking the public for information about ergonomic hazards across the country. The Agency indicated that this could be accomplished through a Request for Information or an Advance Notice of Proposed Rulemaking (ANPR) consistent with the Administration's Regulatory Program. Subsequently, OSHA formally place an ergonomic rulemaking on the regulatory agenda (Ex. 2-17) and decided to issue an ANPR.

Appendix G

OSHA sent a draft copy of the proposed questions for comment on June 20, 1991, to 232 parties, such as labor organizations (including the petitioners), trade associations, occupational groups, and members of the ergonomic community (Ex. 2-18). OSHA requested comments on how the proposed questions should be posed by August 15, 1991. OSHA received 47 comments from those parties. In addition, OSHA met with the Chemical Manufacturers Association, Organization Resources Counselors, Inc. and the AFL-CIO and several member organizations, including the petitioners. OSHA reviewed the comments and submissions and incorporated relevant suggestions and comments into the ANPR.

* * *

VI. Request for Comments and Information

Through this ANPR, OSHA invites interested persons and organizations to provide comments relating to the nature and extent of ergonomic hazards and disorders in the workplace. OSHA requests comments and information on the need for content, extent, and scope of an ergonomic safety and health management regulation. OSHA has also presented a Glossary in Appendix A on which comment is requested. In addition, OSHA requests the submission of supportive information which would be needed for a proposed rule and also invites commentors to raise any other issues which may be relevant.

OSHA also invites comment pertaining to any economic considerations relating to the development of an ergonomic safety and health management standard as discussed in this ANPR. For example, OSHA requests information on benefits to be achieved, such as changes in medical expenses absenteeism,

worker turnover, worker compensation payments, insurance rates, productivity, quality and the level of safety in work practices and environment. OSHA also requests information on the costs of implementing an ergonomic safety and health management standard, such as workstation redesign, medical oversight, and changes in productivity and insurance costs.

OSHA requests that any available injury or illness data related to ergonomic disorders be provided. OSHA also requests that interested parties submit any pertinent data and risk estimates on ergonomic disorders not discussed in this ANPR. Specifically, scientific and technical data and expert opinion are sought on the number of cases of ergonomic disorders, incidence rates, causes of ergonomic disorders, and costs of ergonomic disorders to employees, businesses, and society in general. OSHA also requests information attempting to explain the rise in incidence rates of ergonomic disorders; including work process changes (e.g., increased repetition or force due to changes in process or production demands), increased awareness of ergonomic hazards, and/or reporting changes. For comparative purposes, OSHA requests submission of studies and data on incidence rates of ergonomic OSHA is considering whether to hold informal public meetings to permit oral presentations of additional comments, information, and data prior to the development of a regulation addressing ergonomic hazards. These meetings would serve as a public forum for interested parties to present their views in the early stages of this rulemaking. OSHA is considering public meetings to be held in Washington, D.C. as well as in other locations throughout the United States. OSHA requests comment on whether and where informal public meetings should be held.

Appendix G

OSHA will gather, review and analyze available information on case studies, anecdotal data, and statistical data in which ergonomic hazards have been identified and successful corrective actions have been taken. The basic information sought in each case includes the ergonomic problem that needed resolution, the control measures taken to resolve the problem, the costs of these control measures and the benefits gained by employees, employers and society. OSHA will seek this information from the National Institute for Occupational Safety and Health (NIOSH) Health Hazard Evaluation Reports. OSHA ergonomic settlement agreement results. OSHA consultation programs, Voluntary Protection Program activities. ANPR comments, as well as a variety of other data sources.

* * *

APPENDIX A — GLOSSARY OF TERMS

A wide variety of terms are currently used by employers, occupational safety and health professionals and others in describing ergonomic issues and problems. The following definitions are provided to clarify the terms by OSHA in this ANPR. OSHA requests comments on these definitions.

Ergonomics. Ergonomics is the study of the design of requirements of work in relation to the physical and psychological capabilities and limitations of people, that is, ergonomics seeks to fit the job to the person rather than the person to the job. The aim of the discipline is to prevent the development of occupational disorders and to reduce the potential for fatigue, error, or unsafe acts through the evaluation and design of facilities, environments, jobs, tasks, tools, equipment, processes, and training methods to match the capabilities of specific workers.

Appendix G

Ergonomic hazards. Ergonomic hazards refer to a combination of stressors or workplace conditions that may cause harm to the worker. Improperly designed workstations, tools, and equipment; improper work methods; and excessive tool or equipment vibration are examples of this type of hazard. Other examples stem from job and process design problems that include aspects of work flow, line speed, posture, force required, work/rest regimens, and repetition rates.

Ergonomic disorders. Ergonomic disorders (EDs) are the range of health disorders arising from repeated stress to the body due to exposures to ergonomic hazards. These disorders may affect the musculoskeletal, nervous, and neurovascular systems. EDs include the various occupationally induced cumulative trauma disorders, cumulative stress injuries, and repetitive motion disorders.

A main distinction between EDs and strain or sprain injuries is that the latter usually result from a single act, such as acute trauma. EDs, on the other hand, develop gradually over periods of weeks, months, and years and there are few if any distinctive or dramatic features surrounding their onset. EDs include damage to the tendons, tendon sheaths, synovial lubrication of the tendon sheaths, bones, muscles, and nerves of the hands, wrists, elbows, shoulders, necks, backs, and legs. Some of the more frequently occurring occupationally induced EDs include chronic back pain, carpal tunnel syndrome. DeQuervains disease, epicondylitis (tennis elbow). Raynaud's syndrome (white finger), synovitis, stenosing tenosynovitis crepitans (trigger finger), tendonitis, and tenosynovitis.

Ergonomic stressors. Ergonomic stressors are regarded as synergistic elements or functional subunits of ergonomic

hazards, of which one or more can combine to constitute an ergonomic hazard. Exposure to jobs, operations, processes, or workstations that have multiple stressors decreases the latency of the onset of ergonomic disorders, depending upon the relative intensity, duration, frequency, and combination of each stressor contributing to the ergonomic hazard. Examples of ergonomic stressors include repetitiveness of activity or motion; excessive or required force or grip in performing an activity; awkward, static, or prolonged positioning of the body; vibration; and lighting conditions.

* * *

APPENDIX H — EDITORIAL FROM MAY 1995 PUBLICATION

"EDITORIAL

ERGONOMIC DISORDERS

Over several years members of our Society have become increasingly concerned by the rising number of patients presenting with so-called "ergonomic disorders," also known as "repetitive strain injuries," "cumulative trauma disorders," and the like. Mortin Kasdan, his predecessor William Eversmann, and members of their Industrial Injuries and Prevention Committee have monitored this increasing incidence, have studied the relevant writings in both the lay and medical press, have tracked the actions of interested parties in government, industry and advocacy groups, and have made representations to these parties, where appropriate.

Around the turn of the year, considerable time was devoted to Dr. Kasdan and all members of Council to the preparation of a Society Position paper on this complex, contentious, and potentially expensive group of disorders. As an initial outcome of those efforts, the following comment was adopted by the Council of the American Society for Surgery of the Hand and was presented to the Special Assistant for Ergonomic Programs at the Occupational Safety and Health Administration.

> The American Society for Surgery of the Hand is concerned that premature rules and regulations on so-called "cumulative trauma disorders" could result in ill-founded legislation causing a drain on our nation's economy and could prove deleterious to the physical and psychological well-being of workers.

Appendix H

These concerns are based on our conclusion that the current medical literature does not provide the information necessary to establish a causal relationship between specific work activities and the development of well-recognized disease entities. After experiencing drastic increases in the numbers of patients presenting with work-related symptoms that were supported by subjective complaints alone, the governments of England and Australia passed legislation denying claims for compensation and disability unless they were based on objective findings.

The Society is committed to the establishment of original, well-designed studies using appropriate methodology to determine the correlation between occupational activities and symptoms that occur in the hand and upper extremity.

Until scientifically valid studies are conducted, the society urges Government to exercise restraints in considering regulations designed to reduce the incidence of those conditions, as premature regulations could have far-reaching legal and economic effects, and could have an adverse impact on the care of workers." 20A *J. Hand Surgery* 353 (May, 1995).

APPENDIX I — LETTER DATED AUGUST 19, 1994

U.S. Department of Labor Assistant Secretary for
Occupational Safety and Health
Washington, D.C. 20210

Mr. Richard D. Wayne
Hinckley, Allen & Snyder
One Financial Center
Boston, Massachusetts 02111-2625

Dear Mr. Wayne:

The Boston Regional Office of the Occupational Safety and Health Administration (OSHA) recently forwarded your request under the Freedom of Information Act to us for response to item number one. Under that item, you requested the following:

> All information related to OSHA's nationwide program to reduce or eliminate workplace exposure to ergonomics hazards that lead to cumulative trauma disorders and related illnesses.

At this time, OSHA does not have such a nationwide program. While there have been compliance activities to handle workplaces where musculoskeletal disorders have already occurred, OSHA currently does not have a program that addresses the reduction or elimination of workplace exposure.

However, the Agency is in the process of developing a proposed standard for ergonomic protection that would require employers to address this issue in their workplaces. It is expected to be published this fall. After the standard is proposed, a public rulemaking process that includes a period for written comments and oral testimony will be conducted. A final rule is not expected

to be completed before Spring 1996. It is anticipated that the provisions will be phased in over time, so it will be some years before it is completely implemented and enforced.

A public rulemaking docket has been established for the ergonomic protection standard. A copy of the exhibit list is enclosed for your reference. If you are interested in obtaining any of these exhibits, please contact the Docket Office.

We hope this information is helpful to you.

Sincerely,

s/ Barbara A. Silverstein
Barbara A. Silverstein
Special Assistant for Ergonomics

APPENDIX J — LETTER DATED JANUARY 19, 1994

ONE FINANCIAL CENTER
BOSTON, MASSACHUSETTS 02111-2825
817 845-9000

FAX: 817 549-9020

HINCKLEY, ALLEN & SNYDER
Attorneys at Law

Richard D. Wayne

January 19, 1994

Mr. David C. May
Area Director
Occupational Safety and Health Administration
279 Pleasant Street, Suite 201
Concord, New Hampshire 03301

RE: Sturm Ruger & Co., Inc.
Subpoena duces tecum/Ergonomic Demands

Dear Mr. May:

I am writing to confirm that I have been retained by Sturm Ruger & Co., Inc., Newport, New Hampshire, to represent them in all matters relating to your demand for documents as set forth in your subpoena *duces tecum* dated January 11, 1994.

Please be advised Sturm Ruger does not intend to comply with with your subpoena. The basis for said refusal is as follows: On or about August 17, 1993, as a result of a complaint, a compliance officer from your office demanded entry into the Sturm Ruger & Co., Inc., facilities in Newport, New Hampshire.

Appendix J

The complaint alleged, among other things, that there was inadequate ventilation in the blueing department and pickling room, that certain drums containing chemicals were inadequately labeled, and employees were required to lift those drums. (The original source of the complaint has not, as of this date, been identified.) In addition, at the commencement of this inspection in August, 1993, the compliance officer presented a letter from your to company officials which stated that Sturm Ruger had also been scheduled "for an inspection in accordance with OSHA's health inspection targeting program for local special emphasis related to cumulative trauma disorders (CTDs). You indicated in your letter that Sturm Ruger had been targeted under this local emphasis program based upon records maintained by the State of New Hampshire Workers' Compensation. (SIC). Your letter, however, failed to state the statutory or regulatory basis for your emphasis program.

The company at that time agreed to allow the compliance officer to enter its premises and to engage in air contaminant testing. That testing proved negative.

On or about November, 1993, the compliance officer presented company officials with a checklist for an ergonomic inspection and requested that they respond to the same. At that time the matter was referred to my office.

I thereafter contacted the compliance officer and informed him that based upon the fact that there was no OSHA ergonomic standard and recent Occupational Safety and Health Review Commission law in this area, questioning the validity of OSHA enforcement in this area, that prior to responding to this request for ergonomic information I wanted the opportunity to review this request prior to the company making any formal response. On or

about January 10, 1994, your compliance officer again appeared at Sturm Ruger and demanded the company respond to his information request. At that time, he was informed by a company official that the company was not prepared to respond. He retorted that if the company did not respond to his request for information, the area office would demand not only the information originally requested but would make a more onerous demand.

On January 11, 1994, I contacted you and indicated that based upon the fact there is no ergonomic standard, that recent case law, including, but not limited to, Judge Orringer's *Pepperidge Farm* decision, OSHRC Docket 89-0265 (April 19, 1993,) and testimony provided by OSHA expert witnesses in that hearing, as well as before congress, raised serious questions regarding the validity of OSHA ergonomic inspection program. Nonetheless, I indicated that the company would engage in voluntary compliance with your request if your office agreed that the information supplied by it would not be used as the basis for the subsequent imposition of civil penalties or fines. I further indicated that consistent with the tone of your letter dated August 17, 1993, the company would be enthusiastic about working with health and safety representatives from your office on a consultative basis.

You replied that my offer was unacceptable, that your office was an enforcement agency, and any information obtained by your office during the course of its ergonomic investigation could and/or would form the basis for the imposition of civil fines and penalties.

You went on to state that Sturm Ruger was selected for this inspection program based upon your review of records maintained by the New Hampshire Worker's Compensation System.

Appendix J

In response, I informed you that Sturm Ruger is the eleventh largest employer in the state of New Hampshire. Its New Hampshire workforce numbers 1,152 persons, and it may be the largest, or one of the largest, manufacturers in the State of New Hampshire. Therefore, any conclusions you may have drawn from review of records maintained by New Hampshire Workers' Compensation may be misleading. You agreed.

In conclusion, I stated that based upon the foregoing, the employer was not prepared to comply with your voluntary demand for documents unless the information provided would be used in a manner consistent with the tone of your August 17, 1993 letter and not for enforcement purposes.

In response you issued a subpoena, which, as promised by the compliance officer went well beyond the original information request.

On the same day I filed a Freedom of Information Act request with your office related to your demand. (To date you have not responded to that demand by me.)

In conclusion, Sturm Ruger remains open to voluntary compliance with your demands provided it can be assured you have a lawful basis for your demand and information sought will not be used for punitive purposes. Please advise.

Sincerely,

s/ Richard D. Wayne
Richard D. Wayne

RDW/jmm
WP:WAYNE:SR111633/58525 .AQ3

APPENDIX K — CITATION AND NOTIFICATION OF PENALTY DATED JULY 5, 1994

U.S. Department of Labor
Occupational Safety and Health Administration
279 Pleasant Street
Suite 201
Concord, N.H. 03301
Phone (603) 225-1629 Fax: (603) 225-1580

CITATION AND NOTIFICATION OF PENALTY

To:
Storm Ruger & Co., Inc. and its successors
411 Sunapee Street
Newport, NH 03773

Inspection Site:
411 Sunapee Street
Newport, NH 03773

Inspection Number: 17900630
Inspection Date(s): 08/18/93 - 07/05/94
Issuance Date: 07/05/94

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and notification of penalty (this Citation) describes violations of the Occupational Safety and Health Act of 1970. The penalty(ies) listed herein is (are) based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties proposed, unless within 15 working days (excluding weekends and Federal holidays) from your receipt of this Citation and Notification of Penalty you mail a notice of contest to the U.S. Department of Labor Area Office

at the address shown above. Please refer to the enclosed booklet (OSHA 3000) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Act has occurred unless there is a failure to contest as provided for the Act or, if contested, unless this Citation is affirmed by the Review Commission or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted under the violations(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and Federal holidays), whichever is longer. The penalty dollar amounts need not be posted and may be marked out or covered up prior to posting.

Informal Conference - An informal conference is not required. However, if you wish to have such a conference you may request one with the Area Director during the 15 working day contest period. During such an informal conference you may present any evidence or views which you believe would support an adjustment to the citation(s) and/or penalty(ies).

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Area Director within 15 working days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

Appendix K

If you decide to request an informal conference, please complete, remove and post the page 3 Notice to Employees next to his Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

Right to Contest - You have the right to contest Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest proposed penalties and/or abatement dates without contesting the underlying violations. *Unless you inform the Area Director in writing that you intend to contest the citation(s) and/or proposed penalty(ies) within 15 working days after receipt, the citation(s) and the proposed penalty(ies) will become a final order of the Occupational Safety and Health Review Commission and may not be reviewed by any court or agency.*

Penalty Payment - Penalties are due within 15 working days of receipt of this notification unless contested. (See the enclosed booklet and the additional information provided related to the Debt Collection Act of 1982.) Make your check or money order payable to "DOL-OSHA." Please indicate the Inspection Number on the remittance.

OSHA does not agree to any restrictions or conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Appendix K

Notification of Corrective Action - For violations which you do not contest, you should notify the U.S. Department of Labor Area Office promptly by letter that you have taken appropriate corrective action within the time frame set forth on this Citation. Please inform the Area Office in writing of the abatement steps you have taken and of their dates, together with adequate supporting documentation, e.g., drawings or photographs of corrected conditions, purchase/work orders related to abatement actions, air sampling results, etc.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 30 days after the discrimination occurred with the U.S. Department of Labor Area Office at the address shown above.

Employer Rights and Responsibilities - The enclosed booklet (OSHA 3000) outlines additional employer rights and responsibilities and should be read in conjunction with this notification.

Notice to Employees - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the U.S. Department of Labor Area Office at the address shown above and postmarked within 15 working days (excluding weekends and Federal holidays) of the receipt by the employer of this Citation and Notification of Penalty.

Appendix K

NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with OSHA to discuss the citation(s) issued on July 5, 1994. The conference will be held at the OSHA office located at 279 Pleasant Street, Suite 201, Concord, NH, 03301 on _____ at _____. Employees and/or representatives of employees have a right to attend an informal conference.

Inspection Number: 17900630
Inspection Dates: 08/18/93 - 07/05/94
Issuance Date: 07/05/94

Citation and Notification of Penalty

Company Name: Sturm Ruger & Co., Inc.
Inspection Site: 411 Sunapee Street, Newport, NH 03773

Citation 4 Item 1 Type of Violation: **Willful**

29 CFR 1904.7: OSHA Form(s) and 200 were not available for inspection and copying:

a. Establishment - On or about January 10, 1994, the calendar year 1993 OSHA 200 Form and supplementary record for each occupational injury or illness for that establishment were not provided for inspection or copying.

Date By Which Violation Must be Abated: July 11, 1994
Proposed Penalty: $9000.00

s/ Paul V. O'Connell
PAUL V. O'CONNELL
Acting Area Director

APPENDIX L — LETTER FROM OSHA TO STURM RUGER DATED AUGUST 17, 1993

U.S. Department of Labor

Occupational Safety and Health Administration
Concord Area Office
279 Pleasant Street, Suite 201
Concord, N.H. 03301
(603) 225-1629
(603) 225-1580 Fax

August 17, 1993

Sturm Ruger & Co., Inc.
Guild Rd.
Newport, NH 03773

Dear Sir:

Your workplace has been scheduled for an inspection in accordance with OSHA's health inspection targeting program for local special emphasis programs. The information in this letter should help you understand how and why your establishment was selected for an inspection.

In recent years there has been a dramatic increase in the occurrence of cumulative trauma disorders (CTDs), or repetitive motion disorders, and other work-related injuries and illnesses due to ergonomic hazards. It is OSHA's policy to concentrate its resources in those establishments within industries having the greatest potential for significant health hazards. As a result, in August 1990, OSHA began a nationwide program to help reduce or eliminate worker exposure to ergonomic hazards that lead to CTDs and related illnesses. The program represents a

coordinated effort involving enforcement, information, training, cooperative programs, and research. Experience has shown that firms that have instituted programs in ergonomics have reduced CTDs and at the same time, often have improved productivity.

This special emphasis program was initially directed at the red meat industry. Voluntary guidelines were developed, published, and distributed to assist employers in the industry in developing abatement programs for ergonomic hazards. OSHA's recommended ergonomics program includes the following four major program management, and education. The attached OSHA pamphlet No. 3125, "Engonomics: The Study of Work," provides further details on ergonomic programs.

In New Hampshire there has also been a significant increase in the reported occurrences of CTDs. For example, a study by the State of New Hampshire of "First Report of Injuries" claims from the period January 1986, to March 1987, showed there were 226 reported cases of multiple movement disorders defined as carpal tunnel syndrome and tendinitis. Due to the potentially serious hazards which cause these illnesses, a local emphasis program in this area is deemed appropriate.

The health inspection targeting program under this local emphasis program is based upon the State of New Hampshire's Worker Compensation records and summaries of claims involving carpal tunnel syndrome and tendinitis compiled by company name over a period of at least one year. Inspections will be conducted starting with those establishments having the greatest number of claims in that time period. It is from this procedure that your establishment was selected for inspection.

Appendix L

Thank you for your cooperation in this program. If you have any questions, your industrial hygiene compliance officer is available to discuss them with you.

Sincerely,

s/ David C. May
David C. May
Area Director

dcm/rwd

APPENDIX M — SUBPOENA DUCES TECUM DATED JANUARY 20, 1994

UNITED STATES OF AMERICA

DEPARTMENT OF LABOR

OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION

SUBPOENA DUCES TECUM

TO Floyd S. Potter, Jr., Director Security and Paul Smart, Environmental Engineer at Sturm Ruger & Co., Inc., Newport, New Hampshire

Pursuant to Section 8(b) of the Occupational Safety and Health Act (29 U.S.C. § 657(b)) you are hereby required to appear before David C. May, Area Director, or his designated representative *of the* OCCUPATIONAL SAFETY AND HEALTH ADMINISTRATION, UNITED STATES DEPARTMENT OF LABOR, *at* 279 Pleasant Street, Suite 201 *in the City of* Concord, New Hampshire *on the* 20th *day of* January, *1994, at* 10 *o'clock a.m. of that day, to testify regarding the working conditions maintained by* Sturm, Ruger & Co., Inc., at the Newport, New Hampshire facility

And you are hereby required to bring with you and produce at said time and place the following books, papers, and documents: Boston Regional Instruction CPL 2.13, Appendix C, dated 1/6/93, with answers. (document was presented to Paul Smart on or about 11/12/93) (Continued on page 2)

FAIL NOT AT YOUR PERIL

Appendix M

IN TESTIMONY WHEREOF *I have hereunto affixed my signature and the seal of the* UNITED STATES DEPARTMENT OF LABOR *at* Concord, NH *this* 11th *day of* January, *19*94.

s/ David C. May
AREA DIRECTOR,
OCCUPATIONAL SAFETY AND
HEALTH, UNITED STATES
DEPARTMENT OF LABOR

Copies of any and all credentials and resumes of any ergonomist on staff or retained by company for ergonomic consultation.

Copy of any and all resulting reports including any and all recommendations made to the company from any and all individuals addressing ergonomic issues at the company.

If the company has an ergonomic committee, provide a list of all members and their positions, the frequency of all meetings, the dates and minutes of those meetings.

If the company does not have an ergonomic committee, but has a health and/or safety committee, provide copy of any and all minutes of meetings where ergonomic issues are brought forth.

If there has been education and/or training related to ergonomic issues, provide:

A. Type of training and/or education, dates, and length of time.
B. Roster of those trained and/or educated.
C. Copy of the training material.
D. Name and credentials of the trainer and who trained the trainer.

Appendix M

Provide a list and description of all jobs designated "Light duty."

Provide copy of any and all procedures or programs related to work hardening or worker conditioning.

Provide copy of any and all procedures related to reporting of cumulative trauma disorder (CTD) symptoms.

Copy of any and all controls implemented by the company to reduce or eliminate exposure to ergonomic stressors, and date implemented.

Copy of any exercise program for the prevention of CTDs.

Any and all job descriptions, job safety analysis, or task analysis for the polishing and checkering operations.

Copy of the OSHA-200 forms for calendar year 1993.

Copy of the "First Report of Injury" forms for all illnesses related to "Disorders associated with repeated trauma" (Column 7f of OSHA-200) and all back disorders for calendar year 1993.

Total hours worked for the plant, total manufacturing, polishing, and checkering for calendar year 1993.

Any and all documents which reflect the time to complete processing of parts in the polishing area, quotas, incentives, and piece work for each part or process. Any and all records for the most recent full week of employment that would show the kind and number of parts turned out by each employee in polishing area on all shifts.

Appendix M

APPENDIX C

Boston Regional Instruction CPL 2.13
JAN 06 1993
Office of the Regional Administrator

Collection of information for ergonomic cases involving citations (HINT: Many of these questions may be answered by the company rep.)

A. *Checklist for Ergonomic Inspection.*

1. Data to collect (check when complete):

   __ OSHA 200 log
   __ The number of workers in each job and department
   __ Symptom surveys (Appendix A)
   __ Video tape with narrative
   __ Industrial, VDT or similar Ergonomic checklist (Appendix B)
   __ Illustration of process flow (Appendix D)
   __ Information from questions below

2. Tools that may be needed:

   a. Measuring tape
   b. Protractor (goniometer)
   c. Scale (for weighing)
   d. Video recorder and camera (tripod if needed)
   e. Thermometer (for cold conditions)

   Other tools such as the Peak Performance Analysis system, accelerometer and grip strength dynamometer

may be used through the Regional Ergonomist. Please call the Region Ergonomist for more information.

3. Data to calculate (check when done):

   __ Incidence rates for each of the past five years
   __ Summary of survey results

4. Questions to answer during inspection:

   a. Employer knowledge/hazard analysis
      (1) Is there an ergonomist on staff? Y N
      If no, skp to A. 4 a. (6)
      (2) What is his/her name, address and phone number?_____
      (3) How long has s(he) worked for the company?_____
      (4) How long has s(he) worked at the location under investigation?_____
      (5) What are his/her credentials? (ask for resume)_____
      (6) Is there an ergonomic consultant that has worked with the company? Y N When?___
      (7) If so, ask for a copy of the resulting report, including any recommendations that have been made to the company._____
      (8) To further establish industry knowledge, ask the employer if they have seen the OSHA meatpacking guidelines and/or other industry specific information regarding occupationally related ergonomic hazards. Note the specific source of information._____

Appendix M

(9) Does the employer feel the CTDs are work related? Why/Why not?_____

b. Employee/management involvement

(1) Is there an ergonomic committee? Y N
If no, go to A. 4 b. (4)

(2) Who is on the committee? How often do they meet?
Dates: ____ ____ ____ ____
Members: Name Position
_____ _____

(3) Ask for a copy of the meeting minutes, if available. Y N

(4) Is there a policy that directly addresses safety and health on the same level as production? Y N

(5) Are managers and supervisors responsible and **accountable** for carrying out the ergonomics program? Y N

(5) If there is no ergonomics committee, is there is a health and safety committee. Y N

(6) Are ergonomic issues ever brought forth during the health and safety meetings? Y N (ask for copies of the minutes)

c. Education and training

(1) Has there ever been education and training related to the ergonomic hazards on the job(s) under investigation? Y N
(If no, go to A. 4. d. (1))
Education/Training Dates Length (time)
_____

(2) Who was educated and/or trained? Ask for a roster of those trained and/or educated and copies of the training material.
Roster of attendees Y N
Copies of training material Y N

(3) Who is the trainer and who trained the trainer?
_____

d. Medical management

(1) Does the employer perform baseline/periodic health surveillance to determine employee health after the employee has been hired, but before employee is placed on the job? Y N (ask for copy of protocol)

(2) Do workers return to the same job after they have "recovered" from a work related ergonomic injury? Y N

(4) Is there light duty? Y N
If no go to A. 4. d. (6)

(5) Which jobs have been designated "light duty"? _____

(6) Who determined these jobs to be "light duty" and how did they make that determination?
Name:
Method: _____

(7) Is work hardening utilized (are workers conditioned for specific work requirements before they return to work)? Y N

(8) What are the procedures for reporting CTD symptoms? (ask for copy of policy)

(9) Has management been instructed on the policy related to employee reported CTDs? Y N

(10) Are employees able to report CTD symptoms without fear of reprisal? Y N

(11) Are there incentives that deter workers from reporting CTD symptoms? Y N
List examples: _____

e. Abatement/ergonomic controls

(1) What controls have the company implemented to reduce or eliminate exposure to ergonomic stressors?

Control	Date implemented

(2) Were workers asked for input regarding controls? Y N

(3) Does the company use an exercise program for the prevention of CTDs? Y N if so, ask for copy of program.

(4) Is the program voluntary, mandatory and/or reserved for specific workers? V M R

(5) Are tools maintained? Y N How often?___

(6) Are new tools readily available for employees when the current tools fail to work? Y N

(7) Are these replacements easily accessible? Y N

(7) Are braces, splints or back belts used? Y N

(8) When are they used? _____

(9) Who uses splints and/or braces?

Name	Location of splint or brace

(10) Is their use voluntary V, mandatory (M) or prescribed by a medical person M? Note above, as appropriate.

Appendix M

(11) Do job descriptions exist for each job? Y N
If so, ask for copies.

f. Other information needed (check when completed)
____ Page 1 of OSHA 1B form

Supreme Court, U.S.
FILED
OCT 15 1996
CLERK

No. 96-234

In the Supreme Court of the United States

OCTOBER TERM, 1996

STURM, RUGER & COMPANY, INC., PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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15 pp

QUESTION PRESENTED

Whether the Occupational Safety and Health Administration (OSHA) properly issued an administrative subpoena, demanding documents related to ergonomic issues affecting petitioner's employees, as an adjunct to its investigation of possible violations of the general duty clause contained in Section 5(a)(1) of the Occupational Safety and Health Act of 1970, 29 U.S.C. 654(a)(1).

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 84 F.3d 1. The opinion of the district court (Pet. App. 15a-39a) is reported at 903 F. Supp. 239. The recommendation of the magistrate judge (Pet. App. 42a-56a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 14, 1996. The petition for a writ of certiorari was filed on August 12, 1996. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Occupational Safety and Health Act of 1970 (OSH Act), 29 U.S.C. 651 *et seq.*, aims to assure safe and healthful working conditions for the nation's workforce. Section 5(a)(1), the Act's "general duty clause," requires every employer to provide its employees with "employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm." 29 U.S.C. 654(a)(1). In addition, the Act directs the Secretary of Labor to promulgate occupational health and safety standards applicable to all employers, and to undertake investigations of company workplaces and practices in order to carry out the purposes of the Act. 29 U.S.C. 657(a). In conducting such inspections and investigations, the Secretary may, pursuant to Section 8(b) of the Act, "require * * * the production of evidence under oath." 29 U.S.C. 657(b). District courts have jurisdiction to compel compliance with subpoenas issued under Section 8(b), and may punish the failure to obey such orders as contempt. *Ibid.*

2. Petitioner operates a firearms manufacturing plant in New Hampshire. Pet. App. 15a. In August 1993, an OSHA representative arrived at the plant to conduct an inspection. *Id.* at 3a. The inspection related to an employee complaint (about air quality and housekeeping practices), as well as a Local Emphasis Program instituted by the New Hampshire area OSHA office involving the identification of employers appearing to have an unusually high incidence of workers' compensation claims involving disorders that could be caused by repetitive movements. In the course of the inspection, OSHA requested that

petitioner voluntarily produce certain records pertaining to work-related injuries and illnesses. Petitioner complied with that request. *Ibid.*

Several months later, petitioner refused to accede to OSHA's additional request that petitioner complete a questionnaire related to ergonomic issues at the plant. Pet. App. 3a. OSHA then served petitioner with a subpoena demanding the production of various specified documents, such as job descriptions, certain injury records, and descriptions, if any, of the company's ergonomic training and policies. *Id.* at 3a, 107a-109a. After petitioner refused to comply with the administrative subpoena, OSHA petitioned for enforcement in district court pursuant to 29 U.S.C. 657(b). While the subpoena enforcement action was pending, OSHA issued a citation charging petitioner with failing to provide the agency access to records of employee injuries and illnesses required to be maintained by the OSH Act. Pet. App. 12a.

3. The district court issued an order compelling petitioner to produce the documents under subpoena. Pet. App. 39a.[1] Applying the standard of reasonableness applicable to administrative subpoenas, see *Oklahoma Press Publishing Co.* v. *Walling*, 327 U.S. 186 (1946); *United States* v. *Morton Salt Co.*, 338 U.S. 632 (1950), the district court concluded:

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[1] A magistrate judge issued a recommendation denying the Secretary's application for enforcement of the subpoena, reasoning that because OSHA had not promulgated any ergonomics standards, the agency's issuance of a subpoena seeking information pertaining to ergonomics was unauthorized. Pet. App. 49a, 56a. The district court, however, refused to adopt the magistrate's recommendation.

> Given the strong federal interest in promoting employee health and safety, as well as the data suggestive of a potential relationship between working conditions at the Company and multiple movement disorders experienced by its employees, the Secretary's request for information that might shed some light on possible causes of the injuries was reasonable. The materials sought were well defined, limited in scope, and related to the purpose of the inquiry: to determine if indeed a causal link between injuries and working conditions existed.

Pet. App. 29a-30a. The court also rejected petitioner's challenge to the citation, concluding that it was without jurisdiction to review OSHA's action. *Id.* at 38a.

4. The court of appeals affirmed. Pet. App. 1a-13a. Viewing the central question as whether OSHA had the authority to issue the administrative subpoena, the court concluded that the agency had met the "modest requirements" of reasonableness set forth in *Morton Salt*, 338 U.S. at 652-653; *Oklahoma Press*, 327 U.S. at 208; and *United States* v. *Comley*, 890 F.2d 539, 541 (1st Cir. 1989). Pet. App. 4a-5a. First, the court rejected petitioner's argument that, because OSHA issued the subpoena pursuant to the Local Emphasis Program, the court should apply "the more stringent test applicable to administrative searches, namely, the requirement that on-site inspections be conducted pursuant to 'reasonable legislative or administrative standards.'" *Id.* at 5a (quoting *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 320 (1978)). Pointing out that OSHA was seeking to enforce its subpoena *duces tecum*, and was not seeking to conduct a physi-

cal search of petitioner's premises, the court concluded that the *Barlow's* test had "no bearing on the question" presented. Pet. App. 5a-6a.

The court then turned to petitioner's argument that OSHA lacked authority to issue the subpoena under its authority to investigate possible violations of Section 5(a)(1), the Act's general duty clause, because "ergonomic hazards are not 'recognized hazards' within the purview of" that section. Pet. App. 7a-8a. The court observed that this view "misconstrues the scope of the judicial inquiry that is appropriate at this stage." *Id.* at 8a. According to the court, because subpoena enforcement proceedings are "designed to be summary in nature," arguments relating to "the scope of an agency's substantive authority to regulate are not to be resolved" in such a proceeding.[2] *Id.* at 9a. Thus, the court concluded that the uncertainty surrounding the extent and nature of ergonomic hazards does not provide a basis for challenging the issuance of the subpoena, "especially * * * when, as now, a subpoena is designed to produce the very information that may be needed to shed light upon those questions." *Id.* at 9a-10a (quotation omitted).[3]

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[2] For similar reasons, the court rejected an argument presented by the Washington Legal Foundation, as *amicus curiae* supporting petitioner, that the court should decide whether OSHA has the authority to issue citations based on ergonomic hazards. Pet. App. 10a-11a.

[3] Nor was the court persuaded by petitioner's argument that the subpoena was abusive and overbroad because OSHA has neither issued an ergonomic standard nor defined "ergonomic hazards." Pet. App. 11a-12a. The court found that argument to be "nothing more than a cross-dressing of the argument, previously rejected, that OSHA lacks authority to

Finally, the court of appeals affirmed the district court's holding that it lacked jurisdiction to bar enforcement of the OSHA citation charging a violation of 29 C.F.R. 1904.7 based on petitioner's failure to produce certain of the subpoenaed records. Pet. App. 12a-13a. Relying on its prior decision in *Northeast Erectors Ass'n* v. *Secretary of Labor*, 62 F.3d 37 (1st Cir. 1995), the court concluded that the Act "provides only a few limited bases for original jurisdiction in the district court, and none of those bases exists here." Pet. App. 12a-13a. The court pointed out that petitioner was contesting the citation before the agency and would be entitled to raise all defenses in that proceeding. *Id.* at 13a n.5.

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or of any other court of appeals. Accordingly, further review is unwarranted.

1. Because an administrative subpoena is at most a constructive, rather than actual, search and seizure, there is no requirement that the subpoena be based upon particular legislative or administrative standards. *Donovan* v. *Lone Steer, Inc.*, 464 U.S. 408, 414 (1984). Instead, the Court has consistently held that the Fourth Amendment is satisfied with regard to administrative subpoenas of corporate documents "if the inquiry is within the authority of the agency, the demand is not too indefinite, and the information sought is reasonably relevant." *United States* v. *Morton Salt Co.*, 338 U.S. 632, 652 (1950); see also

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issue a subpoena pursuant to an investigation of ergonomic hazards for possible violations of the general duty clause." *Id.* at 11a.

Lone Steer, 464 U.S. at 415 ("the Fourth Amendment requires that the subpoena be sufficiently limited in scope, relevant in purpose, and specific in directive so that compliance will not be unreasonably burdensome") (quoting *See* v. *City of Seattle*, 387 U.S. 541, 545 (1967)). The administrative subpoena in this case fully satisfies those "minimal limitations on administrative action," and therefore meets the "reasonableness" requirement. *See* v. *City of Seattle*, 387 U.S. at 545.

First, the subpoena in this case falls squarely within OSHA's authority to enforce the Act's general duty clause, 29 U.S.C. 654(a)(1). That clause, which broadly obligates every employer to provide a workplace "free from recognized hazards," governs employer conduct in the absence of more specific OSHA standards. See *International Union, United Auto Workers* v. *General Dynamics Land Sys. Div.*, 815 F.2d 1570, 1577 (D.C. Cir.) (employer's duty under general duty clause to protect employees may extend beyond published OSHA safety standards), cert. denied, 484 U.S. 976 (1987); *Donovan* v. *Royal Logging Co.*, 645 F.2d 822, 829 (9th Cir. 1981) ("The general duty clause applies when there are no specific standards."). As the court of appeals aptly concluded, the agency's "authority to investigate ergonomic conditions in search of possible general duty clause violations easily passes the undemanding test for the enforceability of administrative subpoenas." Pet. App. 11a.

Second, as the court of appeals also noted, it makes no difference whether "a debate rages in both legal and medical circles" over the dangers posed by, and the best methods for alleviating, ergonomic hazards, since "uncertainties of this sort do not provide a

cognizable basis for concluding *at this stage* that OSHA would not be able to issue a citation." Pet. App. 9a. Because OSHA is not required to "charge first and investigate later," the courts below properly enforced the subpoena despite the lack of "some sophisticated standard for systemically specifying ergonomic hazards." *Id.* at 11a (citing *Reich* v. *Montana Sulphur & Chem. Co.*, 32 F.3d 440, 444 (9th Cir. 1994), cert. denied, 115 S. Ct. 1355 (1995)); see also *Morton Salt Co.*, 338 U.S. at 642-643 (administrative agencies vested by statute with investigatory and enforcement duties have power similar to that of grand juries, not only to obtain evidence, but also to "investigate merely on suspicion that the law is being violated" or to obtain "assurance that it is not").

2. Petitioner's argument (Pet. 13-18) that OSHA acted outside its statutory authority and violated the Administrative Procedure Act (APA), 5 U.S.C. 553, in establishing the Local Emphasis Program that led to the subpoena likewise does not affect its enforceability. Even in the context of more invasive inspection warrants, courts have uniformly rejected the notion that an administrative plan adequate to establish probable cause must be promulgated through APA notice-and-comment procedures. See *Department of Labor* v. *Kast Metals Corp.*, 744 F.2d 1145, 1155 (5th Cir. 1984) (OSHA plan to target employers for inspection not subject to APA notice-and-comment rulemaking); *Stoddard Lumber Co.* v. *Marshall*, 627 F.2d 984, 986-988 (9th Cir. 1980) (same). Similarly, courts have held that the possible presence of ergonomic hazards at a workplace may justify a warrant. See, *e.g.*, *In re Midwest Instruments Co.*, 900 F.2d 1150, 1154 (7th Cir. 1990) (granting OSHA warrant for inspection to determine whether employees were

subjected to repetitive motion injuries in violation of general duty clause); *United States* v. *Establishment Inspection of Jeep Corp.*, 836 F.2d 1026, 1027-1028 (6th Cir. 1988) (same).

Moreover, although petitioner initially acknowledges that this case involves a subpoena, the validity of which is to be determined under the *Morton Salt* standard (Pet. 13), petitioner erroneously refers to this action as an "inspection" (see Pet. 20, 22) and then relies on two cases analyzing OSHA's authority to issue citations under the general duty clause. See Pet. 20-23 (citing *Kastalon, Inc.*, 12 O.S.H. Cas. (BNA) 1928 (1986) (involving exposure to potentially carcinogenic substance), and *American Smelting & Refining Co.* v. *OSHRC*, 501 F.2d 504 (8th Cir. 1974) (involving exposure to lead)).[4] However, neither *Kastalon* nor *American Smelting* holds that OSHA lacks authority in any or all instances to regulate ergonomics under the general duty clause. See Pet. App. 8a. Also, as the court below recognized (*id.* at 8a-9a), the fact that a party may have some defense to a later enforcement action resulting from information acquired under a subpoena is not relevant in an action to enforce the subpoena, whether the defense involves the limits of the agency's authority or the merits of the violation. See *EEOC* v. *Kloster Cruise Ltd.*, 939 F.2d 920, 922 (11th Cir. 1991) ("[A] subpoena enforcement proceeding is not the proper forum in which to litigate the question of coverage under a particular statute."); *FTC* v. *Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (dispute regarding whether agency could

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[4] Although OSHA's actions in this case began with an inspection, the only remaining issue is enforcement of the subpoena.

take enforcement action against appellants is the sort of dispute that "ought not to be 'settled in a subpoena enforcement proceeding,'" because "'[a]n agency's investigations should not be bogged down by premature challenges to its regulatory jurisdiction'" (quoting *FTC* v. *Swanson*, 560 F.2d 1, 2 (1st Cir. 1977)), cert. denied, 485 U.S. 987 (1988). As long as the agency's claim of authority is not plainly spurious, a court must enforce the subpoena and leave the merits of the claim to be addressed in a subsequent enforcement action. *Swanson*, 560 F.2d at 2.[5]

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[5] Petitioner also raises a challenge to the validity of the citation issued by OSHA for failure to produce certain of the subpoenaed documents. Pet. i. That issue is no longer raised in this case, however, because OSHA withdrew the citation shortly after the petition for a writ of certiorari was filed, and the proceeding before the Occupational Safety and Health Review Commission (OSHRC) has been dismissed. Furthermore, the courts below were correct to refuse, on jurisdictional grounds, to consider the validity of the citation, because "the law lodges exclusive jurisdiction over challenges to the validity of citations with OSHRC, subject to review by the court of appeals." Pet. App. 12a (citing 29 U.S.C. 659(c), 660(a), and *Northeast Erectors Ass'n*, 62 F.3d at 39-40). See also *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 216 (1994) (holding that the Federal Mine Safety and Health Act's "comprehensive enforcement structure" and "clear concern with channeling and streamlining the enforcement process" demonstrate an intent to preclude district court review of pre-enforcement challenge to agency action).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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